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Frost, Thomas Gold

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A treatise on the incorporation and...

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Boston

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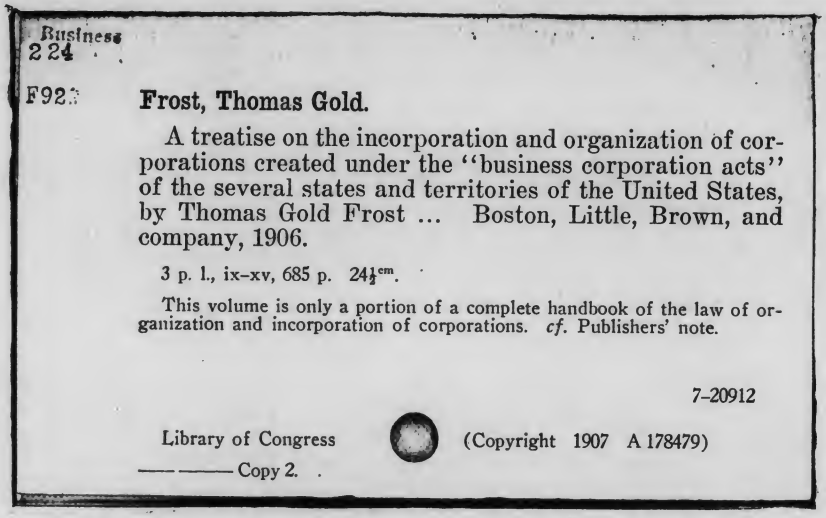

Business
224
F92

Frost, Thomas Gold.

A treatise on the incorporation and organization of corporations created under the "business corporation acts" of the several states and territories of the United States, by Thomas Gold Frost ... Boston, Little, Brown, and company, 1906.

3 p. l., ix–xv, 685 p. 24½cm.

This volume is only a portion of a complete handbook of the law of organization and incorporation of corporations. *cf.* Publishers' note.

7-20912

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School of Business

A TREATISE

ON THE

INCORPORATION AND ORGANIZATION

OF

CORPORATIONS

CREATED UNDER THE "BUSINESS CORPORATION ACTS"
OF THE SEVERAL STATES AND TERRITORIES
OF THE UNITED STATES

BY

THOMAS GOLD FROST, LL.D., PH.D.

OF THE NEW YORK BAR

AUTHOR OF "TREATISE ON GUARANTY INSURANCE," "THE FRENCH CONSTITUTION OF 1793," ETC.

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1906

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THE UNIVERSITY PRESS, CAMBRIDGE, U. S. A.

Rec'm Aug. 9, 1920.

TO

JOHN B. BROWN, ESQ.

OF THE ILLINOIS BAR

THIS WORK IS DEDICATED BY HIS FRIEND, COLLEGE CLASSMATE
AND FIRST LAW PARTNER

THE AUTHOR

PUBLISHERS' NOTE.

We beg to call the attention of the purchasers of this book to the fact that it is only a portion of a complete handbook of the Law of Organization and Incorporation of Corporations. References in the notes to the omitted parts may be found in the complete work.

Part II. contains a Synopsis Digest of the Corporation Laws of the Several States and Territories of the United States. Part III. contains Forms and Precedents.

IRREGULAR PAGINATION

PREFACE

THE present work might with no inconsiderable degree of fitness have been entitled "A Treatise on Comparative Incorporation Law in the Several Commonwealths of the United States." Such a work if properly prepared should not fail to interest the active practitioner as well as the public at large. One of the greatest difficulties met with in the preparation of the volume here presented, has been to successfully condense the subject matter thereof without eliminating any matters of real importance. If, in place of the customary copious references so freely offered in support of principles of corporation law universally considered to be sound, the reader finds only a single citation, he may rest assured that careful investigation has satisfied the author that it represents the prevailing doctrine relative to the particular proposition in support of which it has been cited. This method, it is believed, will meet with favor at the hands of the profession for the following reasons:

The vast majority of the decisions of the courts of this country rendered prior to 1870, in so far as they relate to questions of corporation law, are for the most part a veritable legal "junk-shop" representing either what is now "horn-book law," or else overruled cases. Many of these contain enunciation of principles of corporation law the soundness of which no one in these days would venture to dispute, or else they represent propositions of law which are no longer regarded as sound. The corporation law of to-day, by engrafting into its subject matter accepted principles of agency and estoppel, has assumed a form which the corporation lawyer of fifty years ago would find great difficulty in recognizing.

In the preparation of this work utility and accuracy have been kept constantly in mind. The writer has made free use of certain exceptional facilities that have been open to him through his professional connections, including access to a large number of forms as well as a great deal of correspondence with state officials in the various commonwealths. The forms for drawing charters in the various states, while prepared by the author, have also been approved in every instance by competent attorneys who reside in the state under the laws of which the draft of the charter was made.

All of this has been, it is hoped, to the advantage of the profession and the public at large.

THOMAS GOLD FROST

76 WILLIAM STREET, NEW YORK CITY, N.Y.
December 1, 1904.

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A TREATISE

ON THE

INCORPORATION AND ORGANIZATION OF CORPORATIONS.

INTRODUCTION.

THE development of the modern business corporation act has been most curious and interesting. Previous to the year 1837 charters could be procured only by special act of the legislature. In that year the legislature of Connecticut passed the first business corporation act that went into force and effect in the United States. It was drawn by Theodore Hinsdale, of Winchester, Connecticut, a Yale graduate of the class of 1821. As this act forms the basic work of most of the business corporation acts of to-day, it deserves more than passing notice. It was drafted for the purpose of permitting incorporation thereunder of companies for the purpose of carrying on a manufacturing, mechanical, mining, and quarrying business. The statutory powers of corporations incorporated thereunder were enumerated as follows: To sue and be sued, to have a common seal, to elect officers, to fix their compensation and duties, to establish by-laws, to employ agents, mechanics, and laborers. Incorporation was limited to one purpose, to be distinctly and definitely set forth in the articles of agreement which were required to be signed by all the incorporators. A board of directors was provided for; also a president, secretary, and treasurer. Power was given to the corporation to forfeit stock of stockholders for non-payment of stock subscriptions. The corporation also had a lien upon the stock of its members for debts. After the articles were signed and the corporation organized and the articles of association published,

1

the officers were required to make and file with the Secretary of State (and a duplicate thereof with the town clerk of the town where the corporation was to transact its business) a certificate setting forth, (1) the purpose of the corporation; (2) the amount of its capital stock; (3) the names of stockholders and the number of shares held by each. Annual reports were made obligatory. Stockholders were made liable for all capital refunded to them, and made personally liable for the declaration of illegal dividends.

The passage as well as the operation of the first Connecticut act was watched closely by the legislative bodies of the neighboring States, with the result that by 1850 there were in the neighborhood of a score of general business corporation acts in force and effect in various parts of the country modelled with some few exceptions closely after the Connecticut act above referred to. The operation of these general acts was so satisfactory that a new element appeared in the passage by various States of constitutional amendments forbidding absolutely the creation of private corporations for purposes of profit by special act of the legislature. This has been continued until at the present time special charters cannot be procured save in seven of the Commonwealths.

The next development is to be noted along the line of enlargement of corporate purposes and powers. Gradually the restriction of the earlier incorporation acts limiting the right and benefits thereof to those desiring to incorporate companies for manufacturing and mining purposes was removed so as to permit practically of incorporation for any lawful purpose. At the same time there came a demand on the part of prospective incorporators for greater powers than were permitted at common law, —such, for example, as the right to perform constituent acts outside of the domiciliary State, to hold stock and bonds in other corporations, and to amend their charters unrestrictively. In this way there came to be found in many of the corporation acts a large number of extraordinary powers which were not recognized at common law. This served to greatly popularize the corporate form of organization as compared with individual, partnership, or joint stock company enterprises. The result which followed was natural. The several State legislatures proceeded one after the other to enact statutes compelling incorporators when organizing

corporations to pay a license tax graduated according to the capitalization of the corporation. In this way certain States — notably New Jersey, New York, Delaware, West Virginia, and Maine — have secured a very large revenue — all to the satisfaction of the average tax-payer.

It is characteristic of State legislatures that they never fail to take advantage of an opportunity to relieve a majority of voters from the burdens of taxation at the expense of a few. Doubtless it was with this laudatory purpose in mind that they next proceeded to enact statutes requiring corporations to pay an annual license tax based upon either their authorized capitalization, the amount of capital invested in the State, or the amount of dividends paid annually to stockholders. The success of a few States in securing large revenues from both organization and license taxes resulted in legislative action in other States taken with a view to securing a proper share of the incorporation business, which had hitherto enured to the benefit of two or three favored Commonwealths. This may be properly described as the era of the "tramp corporation." That is, it was about this time that there appeared a well-defined tendency on the part of incorporators to go outside of the State of their residence for a charter under which they planned to do business exclusively in some foreign State. The result has been that incorporators have gradually accustomed themselves to going for their charters to those States which are commonly known as leading incorporating States. In this group will be found at the present time New Jersey, New York, Delaware, West Virginia, South Dakota, Maine, Nevada, Arizona, Connecticut, District of Columbia, Virginia, Oklahoma, North Carolina, and Alabama.

Speaking in general terms, it may be said that a great majority of the business corporation acts in force in this country to-day are sadly in need of revision. Thus, for example, the incorporation acts of Iowa, Nebraska, New Hampshire, Vermont, Rhode Island, Arizona, Mississippi, and the District of Columbia are more or less crude in construction, and lack many of the essentials of complete and satisfactory acts. The incorporation laws of Georgia, Pennsylvania, and Maryland are veritable "legal antiques," and would bear revision without any injury whatever to the best interests of those Commonwealths. The incorporation acts of Indiana, Minnesota, Tennessee, Pennsylvania, and Louisiana are

so involved as to lead to almost certain confusion when an attempt is made to take advantage of their provisions.

In regard to the attitude taken by the legislatures of the several States in the framing of these General Acts, attention is called to some remarks of the Committee on Corporations addressed to the legislature of Massachusetts in 1903, which were as follows:

"The history of corporations, as well as the logic of the case, shows that there are possible two general theories as to the State's duties in creating corporations. First, the old theory that being creatures of the State, they should be guaranteed by it to the public in all particulars of responsibility and management; and the modern, quite opposite theory that, in the absence of fraud in its creation or government, an ordinary business corporation should be allowed to do anything that an individual can do. Under the old theory the capital stock of a corporation was, in the law, considered to be a guarantee fund for the payment of creditors as well as affording a method of corporate enterprise. There resulted from this principle not only the fundamental proposition that the capital stock, being in the nature of a guarantee fund, should be paid for at its par value in actual cash, but all the other provisions to protect creditors or other persons having dealings with the corporation, such as that the debts of a corporation should not exceed its capital stock, designed primarily in the interest of creditors, and secondarily in that of the stockholders, who are looked after as carefully as if they were wards of the State when dealing in corporation matters. Under the modern theory, the State owes no duty to persons who may choose to deal with corporations to look after the solvency of such artificial bodies; nor to the stockholders to protect them from the consequences of going into such concerns, the idea being that in the case of ordinary business corporations the State's duty ends in providing clearly that creditors and stockholders shall be at all times precisely informed of all the facts attending both the organization and the management of such corporations, and particularly that there shall be full publicity given to all details of the original organization thereof."

It may be of some practical value at this point to inquire briefly what are the advantages of conducting business under corporate management rather than as an individual or a copartnership enterprise. These advantages may be enumerated as follows:

First, Immunity from individual liability for debts arising out of the conduct of the business.

Second, The securing of the element of perpetuity for the life of the enterprise in hand, so that the death of any of the parties interested does not interfere with the conduct of the business.

Third, The good-will and prestige of the business is not then the property of an individual, but belongs to the corporation.

Fourth, The ease with which capital is obtained for the use of the business through the sale of stock, thus doing away with the danger or necessity of admitting general or special partners into the concern.

Fifth, The facility with which money can be obtained by the sale of bonds or preferred stock.

Sixth, The ease with which individual interests in a business may be sold or transferred, without the necessity of obtaining the consent of a third party to the sale.

Seventh, The removal of the danger of being ruined through the dishonesty or extravagance of a partner.

Eighth, The small expense connected with the incorporation of an enterprise.

Ninth, The wide and far reaching extension of the powers of a corporation as compared with that of individuals and copartners.

But the advantages of corporate management being stated, the question then arises: Where should the business man of to-day go to procure a charter for the enterprise he may have in hand? With forty-five States, five Territories, and the District of Columbia all offering facilities for incorporation, the task of selection therefrom is by no means an easy one. Where the capitalization is small or the corporate purposes simple, it is sometimes, though not always, best to procure a charter from the State where the principal prospective incorporators reside or where they propose to carry on the company's business. On the other hand, if the capitalization is to be sought in other localities, the proposed corporate business interstate in character, or the prospective capitalization large, and the corporate purposes sought for broad in character, then it may be of great advantage to procure a charter in some outside State. Under such circumstances recourse is usually had to what are recognized as the leading incorporating States already referred to.

But to go further, it may be stated that a proper investigation into the question as to where to look for a charter best suited to the immediate purposes of the proposed corporation must necessa-

rily entail an investigation among many others into the following matters:

1. Nature of the business corporation act of the State wherein it is proposed to incorporate.
2. Policy of such States towards corporations, domestic and foreign.
3. Publicity required as to the condition of corporations organized under the laws of that particular State.
4. Extent of legislative control over private corporations.
5. Nature of corporate powers desired.
6. Initial expense.
7. Amount of annual franchise tax, if any.
8. Amount of capitalization permitted, and the par value of shares allowed.
9. Time within which the capital stock must be paid up.
10. Question as to whether stockholders' and directors' meetings must be held within the State in which the charter is procured.
11. Question as to whether the principal office of the corporation may be maintained outside of the State of its organization.
12. Ascertainment of the question as to whether stock can be legally issued for property or services instead of for cash.
13. Inquiry as to what extent the appraisal of the board of directors of the property or services paid for by the issuance of stock is conclusive upon the creditors of the corporation seeking, in case of insolvency, to enforce an alleged liability for unpaid stock.
14. Power to issue preferred stock.
15. Par value of the corporate shares desired.
16. Power to create debts.
17. Ease or difficulty with which the charter may be amended.
18. Amount of stockholders' liability, if any.
19. Extent of directors' liability, if any.
20. Ease or difficulty with which the corporation may be dissolved.
21. Nature of the laws of the various States with reference to the terms and conditions under which foreign corporations may do business therein.

Each of the foregoing questions has its proper bearing when it comes to deciding where to go for a charter for some particular business enterprise which it is proposed to prosecute under the form of corporate organization.

A discussion of each of these matters will be found in Part I. of the present treatise.

Turning now to the character of the business corporation acts passed by the legislatures of the various States and Territories, it will be apparent to all that many of them are "wonderfully and fearfully made."

If one were to attempt to characterize and compare the various incorporation acts of the several States and Territories, it would be found a task of great difficulty, for the reason that it is almost impossible to find a logical basis for classification. Any number of arbitrary classifications might be adopted, but these would be of no value to either the practitioner or the public at large. Whatever attempt may be made here along this line must be based solely upon the most general lines of similarity of the incorporation acts of various States. As a preliminary to this, it has been noted that certain States and Territories are known and recognized as "leading incorporating States." The ones to which reference is made are New Jersey, New York, Delaware, West Virginia, Maine, South Dakota, Connecticut, Massachusetts, Arizona, Nevada, District of Columbia, and Virginia. The great majority of charters taken out annually in this country are procured in the foregoing enumerated States and Territories.

By many the New Jersey act is considered to be a model of what a business corporation act should be. This fact, coupled with the large revenue secured by the State of New Jersey through this medium, has resulted in the passage in other States of statutes modelled more or less closely after the New Jersey act. This fact prompts the first classification that will be attempted here, which will be termed the "New Jersey Class." Within the limits thereof may be properly included not only New Jersey, but New York, Delaware, West Virginia, Alabama, Nevada, North Carolina, New Mexico, and Virginia as well.

Another classification would embrace a large number of Western States and Territories, which to a greater or less extent have modelled their corporation acts along the same general lines as that of California. This class may properly be referred to as the "California Class," and included therein will be found Colorado, North Dakota, South Dakota, Oklahoma, Idaho, Montana, Oregon, Washington, Utah, Wyoming, Texas, and Arizona.

Another group will be known as the "Maine Group," for the reason that the plan has been therein adopted of having the corporation organized before a certificate of incorporation or organization is filed with or issued by the State officials. In this class belong Maine, Massachusetts, Connecticut, Illinois, Missouri, Arkansas, and Indian Territory.

Iowa and Nebraska have acts very closely resembling each other, and may be grouped as the "Iowa Class." In another group, which we shall call the "Pennsylvania Class," are to be found Pennsylvania, South Carolina, Florida, Mississippi, and Kansas. The distinguishing feature of this class is that the incorporation scheme adopted embraces a petition for incorporation by the incorporators addressed to State officials, to be followed by the filing of a certificate of incorporation if the petition is favorably acted upon.

Another group may be known as the "Kentucky Group," in which belong Kentucky, Ohio, New Hampshire, Rhode Island, and Vermont. The resemblance here, it must be admitted, is more fancied than real, and probably does not depend upon any actual intent to copy the first Kentucky act. In the "Michigan Class" are to be found Michigan, Wisconsin, and Minnesota, all of which possess acts resembling each other in certain features. It is impossible to place Georgia, Indiana, Louisiana, Maryland, and Tennessee in any specified class. They all possess inadequate and certainly unique business corporation acts, which are not likely to be copied by any other State in this day and generation.

PART I.

INCORPORATION AND ORGANIZATION OF CORPORATIONS.

CHAPTER I.

DRAFTING THE CHARTER.

§ 1. **General Remarks on Corporate Charters.** — Incorporation is a form of expression of the sovereign political power of the State in the creation of a juristic person possessing such limited powers as may be granted to it by the legislative branch of our State or national government. The growth of the corporate form of organization affords an example of the rapid evolution from a somewhat circumscribed beginning to proportions that can only be described in this age of industrial trusts and combinations as colossal in character. Even the courts have not infrequently called attention to the modern disposition to incorporate everything.[1]

Much of this is due no doubt to the passage by the various State legislatures of what are commonly known as "business corporation acts." The phrase "business corporation," in this connection, is a broad term, and includes all corporations engaged in business for profit, as distinguished from municipal and eleemosynary corporations.[2] The creation of corporations organized for profit by special act is now forbidden by constitutional provision in all but seven of the States.[3] The existence throughout the country of general incorporation acts has fully reversed the old policy of granting exclusive privileges of any kind to corporations.[4]

[1] See *In re* Italian Mut. Ben. Ass'n, 4 Pa. Dis. Rep. 357.

[2] Adams *v.* Company, Fed. Cases No. 47.

[3] Connecticut, Florida, Massachusetts, New Hampshire, Rhode Island, South Carolina, and Vermont.

[4] People *v.* Company, 130 Ill. 268; 2 N. E. 798.

The purpose of restricting the power to create corporations by special act has been well set forth as follows: "To inaugurate the policy of placing corporations of the same kind upon a perfect equality as to all future grants and powers by making such laws applicable to all parts of the State and thereby securing the vigilance and attention of its whole representation, and, finally, of making the judicial construction of their powers or the restrictions imposed upon them equally applicable to all corporations of the same class." [1]

It is universally recognized in this country that legislative authority is essential to the creation of a corporation.[2] Incorporators cannot come together and agree to become a corporation without conforming to legislative requirements.[3] It has been well said "that there is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis upon which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation by which corporate rights and privileges are usually granted. . If there were no such provisions, there would be an absence of any provision by which the right to exercise corporate powers could be definitely fixed and established, and there would be no means of ascertaining the rights of stockholders and of persons dealing with such association." [4]

The charter of a company together with the general laws of the State of its creation, enumerating and limiting the powers of all corporations of that class, constitutes the measure of its powers, and the enumeration thereof implies the exclusion of all other powers except such as are incidentally or necessarily implied.[5]

The instrument by which corporations are created is known by different names in various parts of the country. The term "charter" is a word which has descended to us from the common law existing in England long before the United States became a nation. It originally referred to the specific grant of certain privileges running from the sovereign to a subject. Subsequently it was applied in this country to a specific act of the legislature

[1] Atkinson *v.* Company, 15 O. St. 21; see also *Ex parte* Pritz, 9 Ia. 30.

[2] McKim *v.* Odom, 8 Bland's Chancery (Md.), 407.

[3] Stowe *v.* Flagg, 72 Ill. 397.

[4] Utley *v.* Union Tool Co., 11 Gray (Mass.), 139.

[5] G. L. & H. I. Co. *v.* Kamper, 73 Ala. 325; Steiner *v.* Steiner L. & L. Co. (Ala.), 26 So. 494; Salt Co. *v.* East Saginaw, 13 Wall. (U. S.) 378.

creating a corporation with distinct and exclusive purposes and powers. With the advent of the passage of general business corporation acts in this country, the word "charter" has been replaced by such terms as "articles of incorporation," "articles of association," "certificate of incorporation," "certificate of organization," and "petition for incorporation." It goes without saying that under the Business Corporation Acts referred to there must be articles of some sort properly executed.[1]

It has been said that the essence of a corporation consists, first, in its capacity to have perpetual succession under a special name and in an artificial form; second, to take and grant property and contract obligations, sue and be sued by its corporate name as an individual; and third, to receive and enjoy corporate privileges and immunities. The first two are the privileges of the incorporators, and the third is the franchise of the corporation.[2]

As far back as 1612 Lord Coke enumerated the essentials of a corporate charter as follows: (1) lawful authority for incorporation; (2) persons to be incorporated; (3) corporate name; (4) domicile; (5) words sufficient in law enumerating the purposes and powers of the corporation. All of these essentials and many more, which by statute are made essentials, are to be found in the business corporation acts of to-day.

Referring now briefly to those matters which are by statute in this country made necessary parts of articles of incorporation, the following may be said: with the exception of Arkansas, Georgia, Indian Territory, Maine, Massachusetts, Mississippi, New Hampshire, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, and Vermont, all have incorporation acts requiring that the duration of corporate existence shall be set forth in the articles of incorporation.

Again, all but New Hampshire and Tennessee require a statement as to the number and par value of shares. More than half the States prescribe that the names of the first or temporary board of directors shall be inserted in the articles, while most of the remaining States require that the number of directors only shall be inserted. Fully half the States authorize the insertion in the articles of provisions for the issuance of preferred stock. A few of the Commonwealths require that the articles

[1] Abbott *v.* Company, 4 Neb. 416; Lusk *v.* Riggs (Neb.), 97 N. W. 1033; Childs *v.* Smith, 55 Barb. (N. Y.) 45.

[2] Snell *v.* City of Chicago, 133 Ill. 413; 24 N. E. 532.

shall contain a statement as to the amount of stock subscriptions, the amount of capital stock paid in, and the amount of capital with which the corporation will begin business. Alaska, Arizona, Delaware, Louisiana, Iowa, Minnesota, Nebraska, and Utah require that the date of the annual meeting shall appear in the articles. Alabama, Connecticut, Delaware, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, South Carolina, Utah, Virginia, West Virginia, and Wisconsin expressly authorize the insertion in the articles of provisions for the regulation of the internal affairs of the corporation. If it is desired to protect stockholders from personal liability for corporate debts, there must be inserted in the articles of incorporation of companies organized under the laws of Arizona, Delaware, Iowa, Kentucky, and Utah provision specifically exempting stockholders from such liability.

And so the enumeration might be continued almost indefinitely of special provisions required in particular States in connection with the incorporation of corporate enterprises.

Finally, attention is called to the various steps necessary to create a corporation under the modern business corporation acts, qualified in every respect to carry out the purposes for which it is formed. These steps may be enumerated as follows: (1) the drafting of the articles of incorporation; (2) the signing of the articles by the requisite number of incorporators, and acknowledgment of the same before an officer duly authorized to take such acknowledgments; (3) filing and recording the articles with the proper State and county officials after payment of the requisite organization tax and filing and recording fees; (4) organization of the corporation ready for the transaction of business; (5) securing the necessary permit from State officials (if any is required) to transact business within the domiciliary State.[1]

§ 2. **Incorporators.** — An incorporator is one of the constituents of a corporation, who by petition or by means of the execution of articles of incorporation invokes the exercise of the supreme political power of the State in the creation of a corporation for the benefit of himself and associates and their successors in interest.[2]

The words "corporator" and "incorporator" have essentially

[1] See Carmody *v.* Powers, 60 Mich. 26; 26 N. W. 80.

[2] *In re* Lady Bryan Co., 1 Saw. 349; E. & N. Y. C. R. R. Co. *v.* Owen, 32 Barb. (N. Y.) 616.

the same meaning. The qualifications of incorporators vary with the State from which the charter is sought. The usual number of incorporators required by the various acts varies from one to five.[1] In Iowa and Nebraska one person may incorporate.[2] Residential requirements on the part of incorporators exist in Alaska, California, Idaho, Kansas, Maryland, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, and Wisconsin.[3] Failure to state residence of incorporators in articles is, however, not fatal to corporate existence.[4]

The general rule is that citizenship is not necessary unless specifically required by the statute of incorporators.[5] It has been said that in the absence of statute providing otherwise incorporators must be stockholders.[6] The rule, however, appears to be otherwise in Oregon, Pennsylvania, South Dakota, Texas, Tennessee, and Georgia.[7] In a majority of the States, however, statutes expressly prescribe that incorporators must be subscribers for at least one share of the capital stock of the proposed corporation.

If married women are under no disabilities, they may act as incorporators.[8] Aliens may be incorporators if statute does not provide otherwise.[9]

Some of the States expressly limit the right to become incorporators to natural persons. However, where no such express limitation exists, there is no question but what the word "person," when used in the statute limiting such matters, would not permit corporations to act as incorporators.[10]

The rule seems to be that incorporators must be of full age.[11] Incorporators must also be known persons.[12] The modern rule

[1] See Part III. Table 4, page 574.

[2] P. B. Corporation *v.* Lamson, 16 Me. 224; Ulmer *v.* Company, 98 Me. 579; 57 Atl. 1001.

[3] See Part III. Table 5, page 575.

[4] State *v.* Foulkes, 94 Ind. 493; see also Halbert *v.* Association (Tex. Civ. App.), 34 S. W. 636.

[5] M. N. F. Co. *v.* Baumbach, 32 Fed. 205; A. S. Co. *v.* Heidenheimer, 80 Tex. 344; 15 S. W. 1038.

[6] Gulliver *v.* Roelle, 100 Ill. 141; Byronville Creamery Ass'n *v.* Ivers (Minn.), 100 N. W. 387; Chase *v.* Lord, 77 N. Y. 11; Medler *v.* Company, 6 N. Mex. 331.

[7] Coyote, etc. Co. *v.* Ruble, 8 Ore. 284; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Singer Mfg. Co. *v.* Peck, 9 S. D. 29; 67 N. W. 947; Ramsey *v.* Tod, 95 Tex. 614; 69 S. W. 133; Byrnes *v.* Beck, 10 Ga. 121; B. B. & T. Co. *v.* J. B. T. Co., 101 Tenn. 545; 48 S. W. 228; Wechselberg *v.* Bank, 64 Fed. 90.

[8] *In re* application for charter, 27 Weekly Notes of Cases (Pa.), 399; *In re* Century Club, 27 W. N. C. (Pa.) 399.

[9] Lamar *v.* Browne, 92 U. S. 187; 23 Law. Ed. 650.

[10] C. R. Co. *v.* P. R. Co., 31 N. J. Eq. 475; Insurance Co. *v.* N. H. P. Co., 37 La. An. 233.

[11] Matter of Globe, etc. Ass'n, 135 N. Y. 280; 32 N. E. 122; H. F. Road Co. *v.* Townsend, 13 Ont. Ap. Rep. 534.

[12] C. R. R. of N. J. *v.* P. R. R. Co., 31 N. J. Eq. 475.

seems to be that incorporators are merely conduits for the purpose of organization for the benefit of future stockholders.[1] Under this rule there can be no valid legal question raised at this day as to the legality of the use of what are commonly known as "dummy incorporators" in the organization of corporations.[2]

§ 3. **Corporate Name.** — Every corporation, like an individual, must have a name under which its business must be carried on. It has been said "that the name goes to the very being of the creation, the knot of the combination, without which corporations could not do their corporate acts, without which it is unable to implead and be impleaded, to take any action until it hath gotten a name."[3] The word "company," which is usually a part of the corporate name, does not necessarily imply a corporation.[4] In Alabama, Colorado, Connecticut, Delaware, Kansas, Kentucky, Missouri, North Carolina, and Virginia statutes exist which provide that the corporate name must end with some such word as "association," "company," "corporation," "club," "society," "syndicate," or "limited."[5]

In a number of the States corporations upon organization are forbidden to take the same name as that of an existing domestic corporation, or one so similar as to be calculated to deceive or cause confusion.[6] Some few of the States go still further and forbid the use of the name of any foreign corporation by newly created domestic corporations, provided the former has secured a permit to do business in the State. The States here referred to are Connecticut, Delaware, Kentucky, Massachusetts, New York, Utah, Virginia, and West Virginia. In the absence of such statute there is ordinarily no restriction on the right to take the corporate name of a foreign corporation.[7]

The corporate name is the property of the corporation, and equity will protect the corporation in any jurisdiction from the

[1] Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43.

[2] Salamon *v.* Salamon Co. (House of Lords Cases), 45 Weekly Rep. 193; 75 Law Times Rep. 426. But see Louisville Banking Co. *v.* Eisenman, 94 Ky. 83; 21 S. W. 531, 1049; Tillyer *v.* Hero Jar Co., 17 Phil. (Pa.) 153.

[3] Smith *v.* Plank Road, 30 Ala. 650; Hazelton Boiler Co. *v.* Company, 137 Ill. 231; 28 N. E. 248.

[4] Clarke *v.* Insurance Co., 7 Mo. App. 77.

[5] On use of word "limited" see Sparks *v.* Company, 3 Idaho, 306; 29 Pac. 134.

[6] See State *v.* McGrath, 75 Mo. 424.

[7] L. V. C. Co. *v.* Hamblen, 23 Fed. 225; G. I. R. G. M. Co. *v.* G. R. Co., 128 U. S. 598; 9 S. Ct. 166; People *v.* H. L. Sus. Co., 111 Mich. 405; 69 N. W. 653.

fraudulent use of another name so like it as to deceive the public and rob it of its business.[1] The mere fact that the corporation against whom a restraining order is asked for has secured a charter in that particular State while the complaining corporation has never been incorporated there or even procured a permit to do business there, will not in most jurisdictions prevent the granting of such relief.[2]

Where statutes exist, such as have been referred to, forbidding the use of similar corporate names, while the attitude of the Secretary of State in such cases with respect to the issuance of a certificate of incorporation is ministerial, yet he has reasonable discretion in the matter and cannot be mandamused when exercising such discretion.[3] In protecting the use of a corporate name the courts proceed on the theory that such name should be protected in equity on principles analogous to those which prevail in the use of trademarks.[4]

§ 4. **Corporate Purposes.** — By corporate purposes is meant the specific declaration in the articles of incorporation of the nature of the business which the corporation is authorized to carry on. Such statement is a matter which primarily concerns the stockholders, and to a less degree the State under whose authority the corporation is created.

In the granting of corporate privileges it is important to specify the purposes and objects because the courts should have some guide in keeping them within the powers granted and conveyed. Unless they be specified with particularity in the petition or in the granting thereof, they might do as they pleased and the law be powerless to restrain them.[5] The purposes enumerated in the articles of association, read in connection with the general laws under which the charter is procured, is the measure of the powers of the corporation.[6]

[1] Ind. Mut. Dep. Co. *v.* Central Mut. Dep. Co., 23 Ky. L. R. 2247; 66 S. W. 1032.

[2] Ind. Mut. Dep. Co. *v.* Central Mut. Dep. Co., 23 Ky. L. R. 2247; 66 S. W. 1032; P. T. S. D. I. Co. *v.* P. T. Co., 123 Fed. 534.

[3] State *ex rel. v.* McGrath, 92 Mo. 355.

[4] P. T. S. D. I. Co. *v.* P. T. Co., 123 Fed. 534; Grand Lodge *v.* Graham, 96 Iowa, 592; 65 N. W. 837; Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462; 39 N. E. 490; American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189; 47 Atl. 936; Hazleton Boiler Company *v.* Hazleton T. Boiler Co., 142 Ill. 494; 30 N. E. 339.

[5] *In re* John H. Deveaux *et al.*, 54 Ga. 673.

[6] G. B. & M. R. Co. *v.* Union Steamboat Co., 107 U. S. 98; 27 L. E. 413; Salt Co. *v.* East Saginaw, 13 Wall. (U. S.) 378.

It must be remembered that articles of association under general acts are the productions of private citizens gotten up in the interest of the parties who propose to become incorporated, and who are stimulated by their zeal for personal advantage rather than for the general good. They are, so far as permitted in accordance with the law, substitutes for legislative action in the place of the will of the people of the State as formerly expressed by acts of the legislature. While it was true at one time that all grants from the State to corporations were strictly construed, this principle has been subject to considerable modification of late years. This is owing to the passage of general incorporation acts which were undoubtedly framed and passed with the intent to liberalize the law in respect to such grants.[1]

"It is fundamental that a corporation can be created and exist only by statutory authority, and if a corporation organizes under a general act and inserts in its articles of incorporation regulations and provisions additional to those required by the creative statute, such additional regulations and privileges are voidable at the will of the State, nor is the corporation permitted to place any restrictions on the manner of exercising its corporate duties other than the statute provides. If the corporation claims the right to exist for a certain purpose, it must show that it was organized under a statute authorizing the creation of a corporation for that particular purpose."[2]

The statutes of the various States differ of course with respect to the character of the purposes for which corporations may be formed. Some of them permit incorporation for any lawful business, without any limitations whatsoever. The phrase "other lawful business," found in so many of the statutes, is, according to the weight of authority, held not to be subject to the *noscitur a sociis* rule, and is used as a "catch-all" for the purpose of including any kind of business for pecuniary profit not otherwise provided for.[3] In setting out the purposes, this must be done with reasonable certainty and definiteness. For example, an application for a charter was refused in Pennsylvania, where it was stated that, in addition to certain enumerated objects, the

[1] Finnegan *v.* Noerenberg, 52 Minn. 239; 53 N. W. 1150.

[2] Indiana Bond Co. *v.* Ogle *et al.*, 22 Ind. Ap. 593; 54 N. E. 407.

[3] Brown *v.* Corbin, 40 Minn. 508; 42 N. W. 481; Green *v.* Breard, 35 La. An. 875; Dittman *v.* Company (N. J.), 54 Atl. 570.

corporation was organized for "such other purposes as might be agreed upon in the future."[1]

In many of the States express mention is made of the various specific purposes for which corporations may be created. As a general rule the incorporators are required to set out in their articles of association the specific purpose or purposes for which the proposed corporation is to be organized.[2]

Turning now to the various States, we find the following statutory provisions relative to the purposes for which business corporations may be created. In Alabama for any general business or lawful enterprise. In Arizona for the transaction of any lawful business. In Arkansas for the transaction of any lawful business. In Colorado for any lawful purpose. In California for any purpose for which individuals may associate themselves. In Connecticut for the transaction of any lawful business. In Delaware for the transaction of any lawful business or to promote or conduct any legitimate object or objects. In the District of Columbia any enterprise or business which may be lawfully conducted by an individual, except banking, real estate, and railroads. In Florida for the transaction of any lawful business. In Georgia for any purpose intended for pecuniary profit. In Idaho for any purpose for which individuals may lawfully associate themselves. In Illinois for any lawful purpose. In Indiana for the transaction of any kind of mining, mercantile, chemical, and manufacturing business; also grain elevator, union stock yards, and transit companies. In Iowa for the transaction of any lawful business. In Kansas for the transaction of any kind of manufacturing, mining, chemical, and mercantile business. In Kentucky for the transaction of any lawful business, or to promote or conduct any legitimate object or purpose. In Louisiana for the transaction of any lawful business, except stock jobbing. In Maine for the transaction of any lawful business. In Maryland for the transaction of any kind of mining, manufacturing, chemical, or mercantile business; also for shipbuilding and industrial purposes, and for the transportation of the products of any manufacturing or mining corporation. In Massachusetts for any lawful purpose except to buy or sell real estate or to sell or manufacture intoxicating liquors. In Michigan for the transaction of any lawful

[1] *In re* Journalists' Fund, 8 Phil. 212.

[2] See Hughes *v.* Company, 34 Md. 316.

business, but only a manufacturing and a mercantile business can be carried on by the same corporation. In Minnesota for the transaction of any lawful business. In Mississippi for any lawful purpose. In Missouri for any purpose intended for profit or gain. In Montana for the transaction of any kind of manufacturing, mining, chemical, or mercantile business, or for any lawful commercial or industrial business, or for carrying on any branch of business designed to aid in or protect the interests of the company. In Nebraska for the transaction of any lawful business. In Nevada for any branch of trade or business, commerce, foreign or domestic. In New Hampshire for the transaction of any lawful business. In New Jersey for any lawful purpose or purposes whatever. In New Mexico for mining and manufacturing or other industrial purposes. In New York for any lawful purpose or purposes. In North Carolina for engaging in any lawful business. In North Dakota for any purpose for which individuals may lawfully associate themselves. In Ohio for any purpose for which individuals may lawfully associate themselves, except for carrying on a professional business. In Oklahoma for mining, manufacturing or other industrial purposes. In Oregon for the purpose of engaging in any lawful enterprise, business pursuit, or occupation. In Pennsylvania for the transaction of any lawful business, but not for more than one kind of business. In Rhode Island to carry on any ordinary business. In South Carolina for any purpose or purposes whatsoever or two or more combined. In South Dakota for the transaction of any lawful business. In Tennessee for the trade of the merchants, and for mining, boring, manufacturing, and other specified purposes. In Texas for manufacturing or mining and the purchase of goods, wares, and merchandise; also for buying and selling agricultural products and for other specified purposes. In Utah for any purpose for which individuals may lawfully associate themselves. In Vermont for carrying on any object or business not repugnant to public policy or the laws of the State. In Virginia for any purpose which may be lawfully conducted by individuals or by a body politic and corporate. In Washington for any trade or business. In West Virginia for any purpose or business useful to the public for which a firm or copartnership may be lawfully formed. In Wisconsin for any lawful business or purpose whatever. In Wyoming for the transaction of any kind of manufacturing,

mining, mercantile, and chemical business or any business designed to aid in the industrial or productive interests of the country.

The foregoing enumeration of purposes for which corporations may be created in the various Commonwealths named above, should be qualified by the statement that in most of them special acts are provided for certain classes of corporations, such as banks, trust companies, insurance companies, etc., under which corporations of that character must be incorporated. Among the few States in which corporations may be created for any lawful purpose whatever including the excepted classes above referred to are Alabama, Virginia, and West Virginia.

Finally, attention is called to the fact that in some few of the Commonwealths the statutes require that the certificate set forth the particular trade to be carried on. Such a provision is in legal effect equivalent to requiring that the purpose or object of the proposed corporation be set forth.

§ 5. **Number of Corporate Purposes Permitted.** — Difficulty frequently arises in determining whether under the provisions of some particular business corporation act parties may incorporate for the transaction of more than one line of business. In some of the States, notably, Alabama, Connecticut, Delaware, Maine, Massachusetts, Nevada, New Jersey, New York, North Carolina, Virginia, and West Virginia, the acts are so framed as to clearly authorize incorporation of companies for any number of purposes not covered by special acts. In all the remaining States, with the exception of District of Columbia, Indiana, Kansas, Louisiana, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Wyoming, the matter is greatly simplified by State officials construing the statutes of their respective States to permit the incorporation of companies for the transaction of any number of lines of business not regulated by special statutes.

In Georgia, Indiana, Maryland, Michigan, Pennsylvania, Tennessee, and Texas the different lines of business are divided into classes. Generally speaking, parties are not permitted to incorporate for lines of business included in more than one of these classes.[1] In Wyoming the law requires the certificate of incorporation to have but one general object. In Ohio only one purpose may be inserted. In Kansas and Missouri the number of purposes is only limited by the provision of law that the name of

[1] The rule is otherwise in Indiana and Maryland.

the corporation shall indicate the nature of the business to be carried on by it.

Some suggestions along the line of determining the question as to the number of purposes which may be inserted in articles of incorporation in any particular States may be here presented, Where the statute permits corporations to be formed for several purposes named in the alternative, separated by the disjunctive conjunction "or," it is held that a corporation cannot be organized thereunder for more than one of such purposes, and that articles of incorporation which include more than one of them are void, and that incorporation under them will be refused.[1]

Again, it would appear that where incorporation for only one purpose is permitted, incorporators must make a choice of such purpose themselves in the first instance, for the courts have quite generally refused to make it for them.[2]

On this general subject the Supreme Court of Texas in a recent case spoke as follows: "A charter must set forth the purpose for which it is formed. This for the reason that if it had been intended that a corporation might be created for two or more of the purposes specified in the statute, it would have been proper to have stated 'purpose or purposes for which it is formed.' The use of the word 'purpose' in the singular number tends to show that it was the intention of the legislature to authorize the creation of a corporation for only one purpose. It may be true that the use of the singular number may not be the conclusion of the question, and that if there were other purposes in the act which either by express declaration or clear implication indicate that it was intended to authorize incorporation for two or more of the designated purposes, whether in the same subdivision or not, we should so hold.[3]

Finally, it may be said that unless the statute expressly or impliedly permits the insertion of more than one purpose in the articles, the insertion of two or more purposes therein will clearly justify State officials in refusing to allow the filing of the same.[4]

[1] State *v.* Beck, 81 Ind. 500; *In re* John H. Deveaux *et al.*, 54 Ga. 673.

[2] Williams *v.* Company, 25 Ind. Ap. 351; 57 N. E. 581; Bayou Cook Nav. & Fisheries Co. *v.* Doullut (La.), 35 So. 729; Or. Ry. & Nav. Co. *v.* Company, 130 U. S. 1; 9 S. Ct. 409; State *v.* Company, 88 Wis. 512; 60 N. W. 796.

[3] Ramsey *v.* Tod, 95 Texas, 614; 69 S. W. 133.

[4] Ind. Bond Co. *v.* Ogle, 22 Ind. Ap. 593; 54 N. E. 407; Woodberry *v.* McClurg, 78 Miss. 831; 29 So. 514; Kinston, etc. Co. *v.* Stroud, 132 N. C. 413; 43 S. E. 9.

§ 6. **Collateral Attack upon Corporate Purposes and Powers.** — The term "collateral attack," as used in corporation law, has reference to the attempt of parties other than the State (in direct proceedings) to question the validity of a corporation's existence and purposes or its right to exercise corporate powers. The law reports are full of conflicting decisions relating to the general subject of collateral attack upon corporate existence, purposes, and powers. The seemingly hopeless confusion which exists among the courts on this subject is largely due to a failure on their part to recognize that the matter has, by a gradual process of statutory and judicial legislation, become at the present time an academic one. It is proposed at this point to discuss at length not only the question of the right to collaterally attack the legality of corporate purposes as set forth in articles of incorporation, but as well to consider in this same connection the right to collaterally attack the validity of corporate existence and the right to exercise corporate powers. This for the reason that all these questions are so closely related to each other as to properly permit of discussion at one and the same time.

At the outset, a word should be said as to the policy that would seem to dictate the establishment of statutory and judicial rules, forbidding the impeachment by indirect methods of a corporation's right to exist. In the first place, such attacks are rarely made except in an attempt to defeat the ends of justice, by setting up defences to actions brought against debtors by corporations, in which the parties interposing the same have generally no direct interest whatever. If the State legislatures had not by legislation, and the courts by an extended application of the doctrine of estoppel, forbidden such collateral inquiry into these matters, it would have been impossible in a great number of cases for litigants to enforce their just rights in courts of law. If such a right were admitted in one case, it must be in all. Corporations might thus be called upon years after their creation to establish the validity of corporate existence, purposes, and powers, which public policy should hold to be valid as against all parties except the State.[1]

Having already observed that the question of the right to collaterally attack corporate existence, purposes, and powers has become largely an academic one, it will now be proper to sub-

[1] Duggan *v.* Company, 11 Col. 113; 17 Pac. 105.

stantiate this statement. That the discussion of this question may proceed along logical lines, attention is first called to the alleged right to collaterally attack the validity of corporate existence.

In twenty-six of the States and Territories collateral inquiry into the legality of corporate existence is expressly forbidden by statute, the right to impeach such existence being expressly reserved to the State alone by means of direct proceedings brought for that purpose.[1] Thus, in California it is provided that where a corporation claims in good faith to be a corporation and doing business as such, its right to exercise corporate powers shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party.

In Delaware the law provides "that no corporation shall be permitted to set up or rely upon the want of legal organization as a defence in any action against it, nor shall any person transacting business with such corporation, or sued for injury to its property be permitted to rely upon such want of legal organization as a defence." In Georgia the law provides that the existence of a corporation claiming a charter, under the color of law, cannot be collaterally attacked, and that all who dealt with the corporation as such are estopped from denying its corporate existence. In Iowa, Kentucky, and Nebraska statutes exist essentially the same as that in force in Delaware as cited above. In Nebraska the law provides that evidence that the corporation is doing business under a certain name shall be *prima facie* proof of its due incorporation or existence pursuant to law.

In Montana collateral inquiry into corporate existence is expressly forbidden, until the fact that there was in fact no such corporation has been adjudged in a direct proceeding brought for that purpose. In South Carolina, it is provided that no irregularity shall be held to vitiate the corporation until a direct proceeding to set aside or annul the charter be commenced by the proper authorities of the State, and all acts and contracts entered into shall have the same force and effect as if no irregularity existed.

In South Dakota, North Dakota, and Oklahoma the law provides that the due incorporation of any company claiming in good faith to be a corporation and doing business as such, its right to exer-

[1] See Part III. Table 3, page 573; see also Boyce *v.* Church, 46 Md. 359; W. & M. W. R. Co. *v.* Supervisors, 64 Cal. 69; 28 Pac. 496.

cise corporate powers shall not be inquired into collaterally. In Tennessee the law provides that the validity of corporate existence shall not be collaterally questioned. Persons acting as a corporation, the law says, will be presumed to be legally incorporated until the contrary is shown, and no such franchise shall be declared annulled or forfeited except in a regular proceeding brought for that purpose. In Texas no person who shall have assumed an obligation to an ostensible corporation as such shall resist the enforcement of such obligation on the ground that there was no such corporation until that fact has been adjudged in a direct proceeding for that purpose.

In Arizona persons acting as a corporation under the provisions of the incorporation act in force in that Territory are by law presumed to be legally organized until the contrary is shown, and no franchise can be declared to be annulled or forfeited except in regular proceedings brought for that purpose. The law also provides that no persons acting as a corporation under such act shall be permitted to set up or rely upon the want of legal organization as a defence to any action brought against them as a corporation, nor shall any person who shall be sued under a contract made with such corporation sue for an injury done to its property or for a wrong done to its interest be permitted to rely upon such want of legal organization in his defence.

Finally, in Mississippi it is provided that it shall not be a defence in any action against a corporation that there was a defect or informality in its organization.

Again in twenty-nine of the States authority is given to State officials to issue certificates of due incorporation.[1] Of this number fourteen are not included in the list of States forbidding collateral attacks upon corporate existence. In such States it is safe to say that the issue of such a certificate is in itself a final adjudication against all parties except the State that a corporation has a legal existence to the extent that it cannot be collaterally attacked by third parties. Particularly where it is organized by the voluntary action of the requisite number of incorporators with the approval and consent of an officer of the State possessing authority in the premises, under an enabling statute permitting corporations of that particular description to be organized thereunder.[2]

[1] See Part III. Table 3, page 573.

[2] O'Brien *v.* Cummings, 13 Mo. Ap. 197; Boyce *v.* Church, 46 Md. 359.

The theory upon which the rule here stated is based seems to be that State officials in issuing a certificate of due incorporation act under a general statute passed by the legislature, and under the terms thereof become agents as it were thereof for that purpose. It therefore follows that the act of such State officials in certifying as to due incorporation, is in effect the act of the legislature which has the supreme power of creating corporations. So it may be safely said that, according to the best current of authority, where the statute gives the State official authority to issue a certificate of due incorporation, such certificate is evidence thereof against all the world except the State.[1]

Again it should be noted that in many of the States the statute itself gives certain probative force to the charter so issued, by providing that the certificate of incorporation, or a certified copy thereof, shall be evidence to a certain designated extent and for certain purposes. Thus in Connecticut, Kansas, Minnesota, North Dakota, and Ohio statutes exist providing that a certified copy of the certificate of incorporation shall be *prima facie* evidence of the legal existence of the corporation. In Colorado, Oklahoma, Oregon, Texas, West Virginia, and Wyoming statutes provide that such certificate shall be evidence of the existence of the company. In California, Colorado, Idaho, Illinois, Louisiana, Montana, Nevada, North Dakota, South Dakota, Oklahoma, Utah, Washington, and Wyoming such a certificate is *prima facie* evidence of the facts therein stated. In New York the certificate of incorporation of any corporation when duly filed is presumptive evidence of its incorporation. In Arkansas a certified copy of the articles is made *prima facie* evidence of the due formation and of the existence and capacity of the corporation. In Colorado it is made evidence

1 Petty *v.* Hayden, 115 Iowa, 212; 88 N. W. 339; Cochran *v.* Arnold, 58 Pa. St. 399; Litchfield Bank *v.* Church, 29 Conn. 137; Napier *v.* Poe, 12 Ga. 170; Carolina Iron Co. *v.* Abernathey, 94 N. C. 545; Casey *v.* Galli, 94 U. S. 673; 24 L. E. 168, 307; Lake Sup. Nav. Co. *v.* Morrison, 22 U. C. C. P. 217; Birds Case, 1 Simon (N. S.), 47; 40 Eng. Ch. 47; *In re* Barneds Bakery Co., L. R. 2 Ch. 674; O'Brien *v.* Cummings, 13 Mo. Ap. 197; N. P. C. I. Co. *v.* Company, 16 Utah, 246; 52 Pac. 168; Holman *v.* State, 105 Ind. 569; 5 N. E. 702; State *v.* Carr, 5 N. H. 367; Jones *v.* Dana, 24 Barb. 395; Taylor *v.* Company, 91 Me. 193; 39 Atl. 560; Finch *v.* Ullman, 105 Mo 255; Saunders *v.* Farmer, 62 N. H. 572; Union Water Co. *v.* Kean, 52 N. J. Eq. 111; 27 Atl. 1015; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537; 38 N. E. 729; W. & P. Ry. Co. *v.* Company, 114 N. C. 690; 19 S. E. 646; Carroll *v.* Bank, 19 Wash. 639; 54 Pac. 32; Vermont, etc. Ry. Co. *v.* Company, 34 Vt. 2; Grubb *v.* Company, 14 Pa. St. 305; W. P. R. Co. *v.* Young, 12 Md. 476.

of the existence of the corporation. In Connecticut it is evidence of the legal existence of the corporation, and it is there provided that it shall serve all the purposes of a charter for the corporation. In Delaware it is made evidence in any court of law or equity. In Georgia a certified copy of the petition for incorporation and order granting the same is made evidence of such incorporation in any court. In Kentucky the law provides that it may be used as evidence in any action for or against the corporation. In Maryland it may be used as evidence in all legal proceedings. In Michigan it is *prima facie* evidence of the due formation, existence, and capacity of such corporation. In Minnesota it is provided that it shall be evidence in all courts of such incorporation. In New Jersey it is evidence in all courts and places. In North Carolina it is *prima facie* evidence of the organization and incorporation of the company purporting thereby to have been established. In Pennsylvania it is evidence for all purposes. In Rhode Island a certificate must be received in evidence before any court, tribunal, or authority. In Tennessee it is competent evidence in any proceeding. In West Virginia it shall be received as evidence of the existence of the corporation. In Wyoming it is provided that it shall be evidence of the existence of the company.

Again, in Massachusetts and Indiana the law provides that the certificate of record shall be conclusive evidence of the existence of such corporation. In Wisconsin it must be received as conclusive evidence of the existence of the corporation or of the organization thereof in all cases where such facts are collaterally involved.

Again, in Alabama the certificate of the probate judge states specifically that the incorporators are duly organized as a corporation for the purposes expressed in the declaration, having the power, capacity, and authority conferred by law. In Florida the law provides that "letters patent" shall be conclusive evidence of the existence of the corporation in all actions where the question of the existence is only collaterally involved, and *prima facie* evidence in all other actions and proceedings. In Indiana the order of the court declaring the existence of a corporation entered "*ex parte*" is conclusive as to the fact of such existence. In Mississippi the law provides that the powers specified in the charter shall by the approval of the Governor be vested in such corporation, and it shall go into operation at the time and on the terms and conditions specified.

Again, certain statutes exist providing that after certain preliminary steps have been taken as prescribed by statute such incorporators and their successors and assigns shall thereupon become a body politic and corporate for certain specified purposes. These statutes really provide that upon the observance of certain specified preliminary conditions relative to the making and execution of articles of incorporation, the incorporators, their successors and assigns, shall be a body politic and corporate under the name and for the purposes stated in the articles. The foregoing is the statutory provision as it exists to-day in substance in South Dakota, North Dakota, and Oklahoma. In Virginia the law provides that they shall be a body politic and corporate by the name set forth in the said certificate and upon the terms and powers set forth therein, so far as not in conflict with law. In Pennsylvania the law provides that they shall become a corporation upon the purposes and terms named in the charter. In Maryland they are declared to thereby become a body politic and corporate according to the objects, purposes, articles, conditions, and provisions in said instrument contained. In Maine they are declared to be a corporation, with all the rights and powers and subject to all the duties, obligations, and liabilities provided by law.

In Connecticut a copy of the certificate of organization is *prima facie* evidence that the corporation has been duly organized and is duly authorized to exercise all its corporate powers. In Maine the certificate of the Secretary of State that the corporation has been duly organized is evidence of the corporate existence of the corporation. In South Carolina a certificate is issued by the Secretary of State that the corporation is fully authorized to commence business under its charter for the purposes indicated in the written declaration of the incorporators.

It is not claimed that the statutory provisions here referred to operate so as to preclude entirely collateral attack upon corporate existence, purposes, and powers. The most that is claimed for them where they do not make certain instruments conclusive evidence of corporate existence, purposes, and powers, is that they shift the burden of proof and render the likelihood of collateral attack more remote.[1]

[1] As to meaning of conclusive evidence, see American Order, etc. *v.* Merritt, 151 Mass. 558; 24 N. E. 918. As to meaning of *prima facie* evidence, see Holmes *v.* Gilliland, 41 Barb. (N. Y.) 569; Knapp, etc. Co. *v.* Strand, 4 Wash. 686; 30 Pac. 1063;

It has now been fairly demonstrated, it is hoped, that in the majority of the Commonwealths collateral inquiry into corporate existence is either prohibited by statute or else is forbidden by implication, by reason of the issuance of certificates of due incorporation, under proper legislative authority, by State officials. In the few remaining States and Territories the courts have either by a process of judicial legislation or by an extended application of the principle of estoppel, practically made it impossible to successfully attack in collateral proceedings the due existence of a corporation. This on grounds of enlightened public policy.[1]

The judicial legislation above referred to covers the cases where it is impossible to apply principles of estoppel either on account of the absence of any conduct on the part of parties litigant showing their recognition of the corporation's existence, or else is inapplicable by reason of such parties having never in any way dealt with the corporation or recognized its corporate existence.[2]

Having now considered at some length the question as to the right to collaterally attack the validity of corporate existence, there naturally follows an inquiry as to the right to attack the validity of corporate purposes and powers when the same are inserted in the articles of incorporation. It would seem to follow, as a logical sequence, that if the rule be once established forbidding collateral attack upon corporate existence, this same rule should operate as well to prevent collateral attack upon corporate purposes and powers. This for the reason that if a corporation exists at all it must necessarily exist with such purposes and powers as are inserted in the articles of incorporation which called the corporation into being.

As has already been observed, a large number of the States have enacted statutes forbidding collateral attack upon corporate existence. For the reasons already stated, it would appear that these statutes would be equally efficacious for the purpose of prohibiting collateral attack upon corporate purposes and powers.

Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; Bates *v.* Wilson, 14 Col. 140; 24 Pac. 99; Wood *v.* Company, 56 Conn. 87; 13 Atl. 137; Jewell *v.* Company, 101 Ill. 57.

[1] See Casey *v.* Galli, 94 U. S. 673; Duggan *v.* Company, 11 Col. 113; 17 Pac. 105; McClinch *v.* Sturgis, 72 Me. 288; Finch *v.* Ullman, 105 Mo. 255; 16 S. W. 863; Saunders *v.* Farmer, 62 N. H. 572; Hackensack Water Co. *v.* DeKay, 36 N. J. Eq. 548; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537; 38 N. E. 729; W. & P. Ry. Co. *v.* Company, 114 N. C. 690; 19 S. E. 646; Reynolds *v.* Myers, 51 Vt. 444; Carroll *v.* Bank, 19 Wash. 639; 54 Pac. 32.

[2] See Marion Savings Bank *v.* Dunkin, 54 Ala. 471.

Again, as has already been stated, a large number of the incorporation acts provide that the certificate of incorporation shall be issued by certain designated State officials. Where such certificates are issued under express or even implied authority of the State, the rule unquestionably is that the validity of corporate purposes and powers not *per se* illegal, inserted in the articles of incorporation, cannot be attacked except by the State in a direct proceeding brought for that purpose.[1]

If, however, the charter is issued without the express or implied approval of the State officials, — their duty being merely to certify to the fact and to mark them when filed as public documents in their respective offices, — then the insertion of purposes not authorized by the statute, yet not unlawful *per se*, would probably not render the charter valid for all purposes even when filed.[2]

To sum up briefly the propositions herein presented, it may be said that collateral inquiry into the legality of a corporation's existence, purposes, and powers is forbidden in this country, (1) by statutes expressly forbidding such collateral attack; (2) by reason of authority vested in state officials to issue certificates of due incorporation which, for the reasons already stated are not open to collateral attack; (3) by reason of statutory provisions giving to certified copies of articles of incorporation certain probative effect; (4) by an extended application of the principle of estoppel forbidding such collateral attacks; (5) by a process of judicial legislation denying on grounds of public policy the right of parties other than the State to attack the legality of corporate existence, purposes, and powers.

§ 7. **Effect of Inserting Illegal Purposes.** — There seems to be a sound basis in law for permitting collateral attack upon purposes that are illegal *per se*. This for the reason that a distinction clearly exists between purposes which are merely unauthorized

[1] State *ex rel.* Walker *v.* Talbot, 123 Mo. 69; 27 S. W. 366; Doty *v.* Patterson, 155 Ind. 60; 56 N. E. 668; T. A. L. Co. *v.* Massey (Tenn.), 56 S. W. 35; Allbright *v.* Association, 102 Pa. St. 411. See also People *v.* Beach, 19 Hun, 259; N. Orleans, etc. R. R. Co. *v.* Frank, 39 La. An. 707; 2 So. 310; Holmes *v.* Gilliland, 41 Barb. N. Y. 569; Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; C. & P. Co. *v.* Secretary of State, 128 Mich. 621; 87 N. W. 901; Cochran *v.* Arnold, 58 Pa. St. 399; Casey *v.* Galli, 94 U. S. 673; Fortier *v.* Bank, 112 U. S. 439; 5 S. Ct. 234; Niemeyer *v.* L. R. J. Ry., 43 Ark. 111.

[2] Williams *v.* Company, 25 Ind. Ap. 351; 57 N. E. 581; Kinston, etc. Co. *v.* Stroud, 132 N. C. 413; 43 S. E. 913; Ramsey *v.* Tod, 95 Tex. 614; 69 S. W. 133; Or. Ry. & Nav. Co. *v.* Or. Ry. Co., 130 U. S. 1; 9 S. Ct. 409; State *v.* Company, 88 Wis. 512; 60 N. W. 796; G. L. H. Ins. Co. *v.* Kamper, 73 Ala. 325.

by the terms of the general incorporation act, and those purposes which are forbidden by express statute, — civil or penal. In the latter case it seems clear that even the approval by a State official of such unlawful purposes as evidenced by the issuance by them of certificates of due incorporation, do not forbid collateral attack thereon in any suit whereby the corporation seeks to benefit by the insertion of such unlawful purposes in its articles.[1]

The rule might be still further extended so as to apply to purposes which may be lawful in a general way, yet which may be deemed unlawful on account of the limitations inserted in the articles upon the means by which such purposes are to be carried out.[2] The same principle would apply where the purposes are clearly contrary to the public policy of the State.[3] But if purposes are lawful on their face, they will, as against all but the State, be presumed to be such.[4] Where some of the purposes are merely unauthorized, while others are valid and proper, the insertion of the unauthorized purposes will not vitiate the incorporation.[5] But where any of the purposes are illegal *per se*, the State officials would be clearly justified in refusing to allow the articles to be filed, though some of them are lawful.[6]

§ 8. **Corporate Powers, Classification of.** — By "corporate powers" is meant the right or authority of a corporation to act along certain lines prescribed for it in the instrument whereby it was created. The tendency of modern decisions is to assimilate the powers of private corporations to those of individuals and copartnerships.[7] It is unnecessary to say that a corporation cannot assume for itself powers of action, irrespective of statute, by the mere declaration thereof in its articles of incorporation.[8] Neither can they be created by by-law.[9]

The Supreme Court of the United States[10] has observed that

[1] F. N. Bank *v.* Company, 59 Ohio St. 316; 52 N. E. 834; *In re* DuQuesne College, 2 Pa. Dist. Ct. Rep. 555; Matter of Agudath Hakehiloth, 18 N. Y. Mis. Rep. 717; 42 N. Y. Sup. 985; State *v.* Company, 29 Neb. 700; 46 N. W. 155.

[2] Or. Ry. & Nav. Co. *v.* Or. Ry. Co., 130 U. S. 1; 9 S. Ct. 409.

[3] Scheutzen Bund *v.* Agitations Verein, 44 Mich. 313; 6 N. W. 675; McGrew *v.* C. P. Ex., 85 Tenn. 572; 4 S. W. 38; *In re* Benefit Society, 10 Phil. 19; People *v.* Company, 130 Ill. 268; 22 N. E. 798.

[4] U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58; 42 N. E. 403.

[5] Skick *v.* Company, 15 Ind. Ap. 310; 44 N. E. 48.

[6] State *v.* Company, 88 Wis. 512; 60 N. W. 796.

[7] Fink *v.* Company, 5 Ore. 301.

[8] People *v.* Green, 116 Mich. 505; 74 N. W. 714.

[9] Andrews *v.* Company, 37 Me. 256.

[10] Thomas *v.* Company, 101 U. S. 71.

" we take the general doctrine to be that the powers of corporations organized under general statutes are such and such only as are conferred by statute. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of the corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The foregoing is true only as to certain classes of powers which are hereinafter referred to as " express powers." The rule is not applicable either to what are known as " common law papers " or to the " incidental powers " of corporations. Corporate powers may properly be divided into three general classes, to wit: (1) Common Law Powers; (2) Express Powers; (3) Incidental Powers. Generally speaking, there is no existing rule or principle by which corporations created for a certain specific object or to carry on a particular trade or business are to be held to be prohibited from all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertains to the general purposes for which this charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to the main business, or which may become necessary or profitable in the care and management of the property which it is authorized to hold. The same is true as to certain powers which are held to exist at common law even in the absence of any specific reference to such powers in the articles of incorporation.

§ 9. **Common Law Powers, Definition of; Enumeration of.** — Common law powers are those which the law bestows upon corporations irrespective of statute or charter provisions, as being necessary for the carrying out of the purposes for which it was created.[1] The common law gives to corporations the powers belonging to corporations of their class, unless there is something in the nature of the corporation or in the terms of its charter, or in the act under which it was incorporated inconsistent with the exercise of the powers, or there is some general statute restricting the same.[2]

[1] Falconer *v.* Campbell, 8 Fed. Cases, 4620; 2 McLean, 195; C. O. N. G. & F. Co. *v.* C. D. Co., 60 Ohio, 96; 53 N. E. 711; State *v.* Company, 144 Mo. 562; 46 S. W. 593; Knowles *v.* Beatty, 1 McLean, 41; Leggett *v.* N. J. M., etc. Co., 1 N. J. Eq. 541.

[2] Smith *v.* Company, 27 N. H. 86; Sutton's Hospital Cases, 5 Coke's Rep. 253.

The common law powers here referred to may be enumerated as follows: (1) the right to the use of a corporate name; (2) the right to perpetual succession; (3) the right to acquire, hold, and dispose of corporate property; (4) the right to appoint corporate officers and agents; (5) the right to establish by-laws for the government of the corporation, its officers and members; (6) the right to sue and be sued.

An examination of the various corporate acts in force in the several States and Territories will serve to show that without exception they contain an enumeration more or less full of the common law powers above referred to. In Indiana the statute refers to them as common law powers, and proceeds to enumerate them.[1]

§ 10. **Right to a Corporate Name.** — The right to the use of a corporate name is a power well recognized both at common law and by statute. Corporations have a property right to the use of such name in the transaction of their business which the courts will always protect.[2] They are recognized in law only by their corporate name.[3]

The name is said " to be the very being of their constitution; the knot of their combination; without which they could not do their corporate acts; for it is unable to implead and be impleaded, to take any action until it hath gotten a name."[4]

The action of State officials in granting the use of a name, it may be observed, is not conclusive, for courts of equity will nevertheless protect corporations in the use of their name.[5] State officials have, however, the power to protect the use of corporate names when applications are made for charters, even when the proposed name is not exactly similar to that of existing corporations.[6]

The right to have a corporate name is in itself a common law power; but it is one which is not alienable.[7]

§ 11. **Right of Perpetual Succession.** — The " right of perpetual succession " under a designated corporate name is one of the common law powers of a corporation. The words " perpetual

[1] Ind. Session Laws, 1901, ch. 127, § 28.

[2] L. D. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; see also *ante*, § 3.

[3] Curtiss *v.* Murry, 26 Cal. 633.

[4] Smith *v.* Company, 30 Ala. 650.

[5] Grand Lodge, etc. *v.* Graham, 96 Ia. 592; 65 N. W. 837.

[6] State *ex rel.* *v.* McGrath, 92 Mo. 355; 5 S. W. 29.

[7] State *v.* Company, 40 Kan. 96; 19 Pac. 349; Detroit Citizens' Street Ry. Co. *v.* Common Council, 125 Mich. 673; 85 N. W. 96.

succession" do not refer to the duration of the life of the corporation, where this is specifically limited either by statute or by the articles of incorporation, but merely operates to grant the continuation of corporate life during the period so prescribed.[1] Perpetual succession ordinarily merely conveys the right of continued unbroken succession for the period of time limited for the corporate existence.[2]

§ 12. **Right to adopt and use a Corporate Seal.** — It is an inseparable incident to every corporation that it may have a common seal, and make, alter, and renew the same at pleasure.[3] The doctrine of the common law requiring the use of a corporate seal in the execution of corporate contracts is practically obsolete, and the seal is now required, in the absence of express statute, only when it would be required of a natural person under similar circumstances.[4] Ordinarily the exercise of this power is delegated by the stockholders to the directors by means of an appropriate by-law.[5]

§ 13. **Power to acquire, hold, and dispose of Real and Personal Property.** — No doctrine of the common law is more clearly and undeniably established than that which concedes to corporations an inherent right to acquire and hold title to real and personal property, except so far only as they may be restricted by the objects of their creation or the limitations of their charter.[6] The power to acquire such property, when not restricted by statute, is only limited by the rule that it must be such as is reasonably necessary or convenient to enable it to accomplish the purposes for which it was created.[7]

Formerly the amount of real property which a corporation might purchase and hold was very generally limited by statute in most of the Commonwealths. The existence of such statutes may be traced to the policy of the common law and to the existence in England of statutes known as statutes of mortmain, which prohibited corporations from taking and holding real estate without licenses from the king or Parliament.[8] However, in most of the

[1] State *v.* Payne, 129 Mo. 468; 31 S. W. 797.

[2] Scanlon *v.* Crawshaw, 5 Mo. Ap. 337; see, however, Fairchild *v.* Association, 71 Mo. 526.

[3] Ransom *v.* Bank, 13 N. J. Eq. 212; Thomas *v.* Dakin, 22 Wend. 9.

[4] Green Co. *v.* Blodgett, 55 Ill. Ap. 556.

[5] Woodman *v.* Company, 50 Me. 549.

[6] Lathrop *v.* Bank, 8 Dana (Ky.), 114; Thompson *v.* Waters, 25 Mich. 214.

[7] Brown *v.* Hogg, 14 Ill. 219; Richardson *v.* Association, 131 Mass. 174.

[8] Leazure *v.* Hillegas, 7 Ser. & R. (Pa.) 313; White *v.* Howard, 38 Conn. 342; Page *v.* Heineberg, 40 Vt. 81; Rivanna Nav. Co. *v.* Dawsons, 3 Grat. (Va.) 19; Moore *v.* Moore, 4 Dana (Ky.), 354; Mallett *v.* Simpson, 94 N. C. 37; Trustees *v.* Manning, 72 Md. 116; 19 Atl. 599; First M. E. Church *v.* Dixon, 178 Ill. 260; 52 N. E. 887.

States such restrictions have been done away with, and corporations may now hold such property, both real and personal, as the attainment of their corporate purposes may require. In any event, the general power of a corporation to hold real estate is primarily a question betwen the corporation and the State, and cannot ordinarily be raised by third parties.[1] Where such statutes exist the corporation has of course no power to exceed the statutory limit as against the State.[2]

The general rule is that corporations, unless forbidden by statute, have implied power to take property by devise.[3] The same rule applies with respect to the power of taking and holding property in trust, provided in so doing it acts within its corporate powers.[4] The power of a corporation to sell and convey is as broad as the power to purchase and hold, and is granted on the same terms.[5]

§ 14. **Power to appoint Corporate Officers and Agents.** — At common law corporations have the inherent power, irrespective of statute or charter provision, to elect directors and executive officers and to appoint such agents as the business of the corporation require.[6]

§ 15. **Power to establish By-laws.** — Every corporation has the implied power to enact such by-laws as may be necessary for the proper government of the corporation, its officers, and stockholders.[7]

Sometimes the statutes prescribe the nature of the by-laws to be adopted and authorize penalties for violation thereof.[8]

[1] C. B. & Q. R. R. Co. *v.* Lewis, 53 Ia. 101; 4 N. W. 842.

[2] Market St. Ry. Co. *v.* Hellman, 109 Cal. 571; 42 Pac. 225; *In re* McGraw's Estate, 111 N. Y. 66; Andrews *v.* Andrews, 110 Ill. 223; Graves *v.* Niles, 1 Walker (Mich.), 332.

[3] White *v.* Howard, 38 Conn. 342; Ravanna Nav. Co. *v.* Dawsons, 3 Grat. (Va.) 19.

[4] Vidal *v.* Girards Executors, 2 How. (U. S.) 127; Morris *v.* May, 16 Ohio, 469; F. L. T. Co. *v.* H. F. N. Co., 41 N. Y. 619; White *v.* Rice, 112 Mich. 403; 70 N. W. 1024; Greene *v.* Dennis, 6 Conn. 304.

[5] Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543; People *v.* College, 38 Cal. 166.

[6] Kearney *v.* Andrews, 10 N. J. Eq. 70; A. R. R. Co. *v.* Kidd, 29 Ala. 221.

[7] Wells *v.* Black, 117 Cal. 157; 48 Pac. 1090; People *v.* Society, 24 Barb. N. Y. 570; Martin *v.* Association, 2 Coldw. (Tenn.) 418; Mechanics' Bank *v.* Smith, 19 Johns. (N. Y.) 115; Steger *v.* Davis, 8 Tex. Civ. App. 23; 27 S. W. 1068.

[8] Cahill *v.* Company, 2 Doug. (Mich.) 128; Mobile *v.* Yuille, 3 Ala. 137.

§ 16. **Power to sue and be sued.** — It has been the rule of the courts from time immemorial to recognize and enforce the power of corporations to sue and be sued under and by their corporate name as incident to such corporate existence.[1]

§ 17. **Express Powers, Definition of; Enumeration of.** — Express powers are those which are either granted to all corporations alike by statute, whether inserted in the charter or not, or else are those which are permitted by statute to such corporations as may see fit to take advantage of them, by reserving such powers in the charter itself. Statutes of the character first referred to are construed by the courts to be *ipso facto* read into the charter, thereby becoming part and parcel of it. On the other hand, the last-named powers can only be availed of by the corporation when, as has been stated, they are specifically reserved or set forth in the articles of incorporation. Express powers relate not only to the right to engage in a special line of business as set forth in the statement in the articles of the object or purposes for which the corporation is formed, but they relate as well to other powers which are here termed "express," inasmuch as they depend upon the existence of specific statutes authorizing their exercise by such corporations as desire to avail themselves thereof. These express powers may be divided into twenty-eight classes, enumerated as follows: (1) power to purchase its own capital stock; (2) power to subscribe for, purchase, and hold stock in other corporations; (3) power to consolidate with other corporations; (4) power to transact all or any part of its business outside of the State of its origin; (5) power to extend its corporate existence; (6) power to change its corporate name; (7) power to increase or decrease its capital stock; (8) power to issue preferred stock; (9) power to change the corporate purposes; (10) power to change the number of directors; (11) power to change its domiciliary office or place for the transaction of its business; (12) power to acquire and enforce a lien upon stock of the corporation to secure the payment of debts due the corporation from stockholders; (13) power to levy assessments against the stockholders with the right to forfeit the stock for non-payment thereof; (14) power to authorize voting at stockholders' meetings by proxy; (15) power to allow cumulative voting at the election of directors; (16) power to issue stock as full paid and non-

[1] S. W. Co. *v.* Armstrong, 17 Me. 34.

assessable in exchange for property or services; (17) power to sell the corporate assets; (18) power to voluntarily dissolve the corporation without recourse to the courts; (19) power to insert in the charter provisions for the regulation of the internal affairs of the corporation; (20) power to authorize directors to adopt by-laws; (21) power to authorize appointment of executive committee from board of directors; (22) power to enlarge or diminish corporate powers; (23) power to change par value of shares; (24) power of bondholders to vote at elections of directors; (25) power to classify directors; (26) power to amend articles before organization; (27) power to surrender charter before organization; (28) power given to minority stockholders to compel purchase of their holdings upon consolidation.

Of the foregoing enumerated powers, the following when expressly authorized by statute are applicable to all corporations alike, whether reserved or enumerated in the articles of incorporation, to wit: The power to consolidate with other corporations; to perform constituent acts outside of the State of its origin; to extend its corporate existence; to change its corporate name; to increase or decrease its capital stock; to change the corporate purposes, the number of its directors, its domiciliary office or place for the transaction of its business; to acquire and enforce a lien upon stock of the corporation to secure the payment of debts due the corporation from stockholders; to levy assessments against the stockholders with the right to forfeit stock for non-payment thereof; to authorize voting at stockholders' meetings by proxy; to permit cumulative voting at election of directors (unless such right is merely made permissible by statute); to issue stock as full paid and non-assessable in exchange for property or services; to sell the corporate assets in their entirety; to voluntarily dissolve the corporation without recourse to the courts; to authorize the directors to adopt by-laws (unless such authority is by statute required to be reserved in the articles of incorporation); to appoint an executive committee; to enlarge or diminish the corporate powers; to change the par value of shares; to amend articles before organization; to surrender charter before organization; power given to minority stockholders to compel purchase of their holdings upon consolidation.

Of the remaining express powers it is probably in accord with the general current of authority in this country to say that to be

available to the corporation they must be reserved or specified in the articles of incorporation. The powers to which reference is here made may be enumerated as follows: To subscribe for, purchase, and hold stock in other corporations; to transact all or any part of its business outside of the State of its origin; to issue preferred stock; the power to insert in the charter provisions for the regulation of the internal affairs of the corporation; power of bondholders to vote at election of directors; power to classify directors; and possibly power to purchase its own capital stock.

§ 18. **Power of Corporations to purchase their own Stock.** — There is considerable conflict of opinion in this country relative to the question whether a corporation may purchase its own stock without express statutory authority so to do. One line of decisions holds to the view that such power exists only when expressly conferred by statute no matter what the purpose may be.[1] Other courts of equally high standing take the view — and this we believe to be the true one — that every corporation has implied power to purchase its own stock provided it does so in good faith and without prejudice to the rights of creditors.[2] It has been said that, "generally speaking, a corporation, when acting within the scope of the purposes of its organization, has the same power to contract with reference to such powers as an individual. We believe the rule to be well settled in the United States by the overwhelming weight of authority and reason that a private corporation may purchase its own stock if the transaction is fair and in good faith; if it is free from fraud, actual or constructive; if the corporation is not insolvent and in process of dissolution, and if the rights of creditors are in no way affected thereby."[3]

Where there is no formal corporate action taken, authorizing the purchase of the company's own stock, a purchase made thereof, even though all the stockholders separately consented thereto, would be invalid as against creditors.[4]

[1] Crandall *v.* Lincoln, 52 Conn. 73; Currier *v.* Company, 56 N. H. 262; Morgan *v.* Lewis, 46 O. St. 1; 17 N. E. 558.

[2] City Bank Columbus *v.* Bruce, 17 N. Y. 507; N. E. T. Co. *v.* Abbott, 162 Mass. 148; 38 N. E. 432; Clapp *v.* Petersen, 104 Ill. 26; Hall & Farley *v.* Henderson, 126 Ala. 449; Bank *v.* Company, 18 Vt. 131; Chapman *v.* Company, 62 N. J. 497; 41 Atl. 690; Belknap *v.* Adams, 49 La. Ann. 1350; 22 Sou. 382; Ins. Co. *v.* Swigert, 135 Ill. 162; 25 N. E. 382; Porter *v.* Company (Mont.), 74 Pac. 938.

[3] Porter *v.* Company (Mont.), 74 Pac. 938.

[4] De La Vergne Refrigerator Machine Co. *v.* German Savings Institution, 175 U. S. 38; 44 L. E. 65.

Some of the States expressly authorize corporations to purchase shares of their own capital stock, while others expressly forbid it.[1] The rule of course does not apply to those cases where statutes exist expressly authorizing the forfeiture of stock for non-payment of assessments.[2] The purchase by a corporation of its own stock does not extinguish it.[3] Many of the States have statutes expressly forbidding corporations to vote their own stock when held or owned by them. Even in the absence of such statute, it is probable that the courts would enjoin corporations from voting their own stock.[4] By statute in a number of States corporations are forbidden to purchase their own stock.[5]

§ 19. **Power to subscribe for, purchase, and hold Stock in other Corporations.** — The prevailing rule in this country is that unless the power is expressly given by statute or by reservation of such right in the charter, corporations have no implied power to subscribe for, purchase, or hold stock in other corporations.[6]

An attempt has been made in some States to establish the rule that where the statute does not expressly prohibit such act, the corporation may purchase stock in other corporations without any express authority so to do, provided the circumstances are such as to render the transaction a necessary and proper means for accomplishing the objects of its creation.[7]

If, however, there is no statutory prohibition in the matter and the State officials permit the insertion in the articles of the power to purchase and hold stock in other corporations, the exercise of such power is unquestionably valid.[8] In the same connection it may be observed that a corporation cannot organize subsidiary companies unless such power is given in express terms in the charter or by necessary implication from the powers thereby conferred.[9]

[1] See Part III. Table 15, page 585; also Tolman *v.* Company (Dak.), 22 N. W. 505.

[2] Taylor *v.* Company, 6 Ohio, 83; State *v.* Association, 35 O. St. 258.

[3] Bank *v.* Wickersham, 34 Cal. 444; Clapp *v.* Peterson, 104 Ill. 26.

[4] See McNeely *v.* Woodruff, 13 N. J. Law, 352; Brewster *v.* Hartley, 37 Cal. 15.

[5] See Tolman *v.* Company (Dak.), 22 N. W. 505.

[6] Franklin Bank *v.* Commercial Bank, 36 O. St. 258; Central Ry. Co. *v.* Collins, 40 Ga. 582; First Nat. Bank *v.* Nat. Exchange Bank, 92 U. S. 122; Knowles *v.* Sandercock, 107 Cal. 629; 40 Pac. 1047.

[7] Hill *v.* Nisbet, 100 Ind. 341; Peshtigo Co. *v.* Company, 50 Ill. App. 624; S. P. T. Co. *v.* Company, 50 Minn. 93; 52 N. W. 274; Steamship Co. *v.* Company, 28 La. An. 173.

[8] N. S. Co. *v.* Horton (Neb.), 93 N. W. 225; De La Vergne Refrigerating Machine Co. *v.* German Savings Institution, 175 U. S. 38; 20 S. Ct. 20.

[9] Lagrone *v.* Timmerman, 46 S. C. 372; 24 S. E. 290.

In Alaska, District of Columbia, and Georgia corporations are forbidden by statute to hold stock in other corporations.

§ 20. **Power to consolidate with other Corporations.** — Corporations cannot consolidate as against dissenting stockholders, however desirable or beneficial the consolidation may be, unless legislative authority is granted to that end.[1] In the exercise of the police power of the State it may lawfully prohibit the consolidation of corporations.[2]

Consolidation of corporations to a greater or less extent is permitted by statute at the present time in the States of Alabama, California, Connecticut, Delaware, Illinois, Kentucky, Maine, Montana, Nevada, New Jersey, New York, North Carolina, Virginia, and West Virginia. An attempt has been made to lay down the rule that in order to effect a lawful consolidation as between two corporations, the power to so consolidate must be conferred by each of the States under whose laws they were created.[3] A better rule, however, and the only practicable one seems to be this: That either statutory power to dispose of all the assets of the corporation, or in the absence thereof, the consent of all the stockholders must be obtained to the sale of the assets of one corporation to another. Consolidation in this way then takes the form of a selling out and of accepting money or shares in the new corporation in return for the assets of the old.[4]

§ 21. **Power to transact all or any Part of the Corporate Business outside of the State of its Domicile.** — If there are no statutory restrictions, a corporation has implied power to carry on its business at any place within the State in which its charter is procured.[5] The statutory requirement requiring the corporation to fix in the articles its principal place of business does not prohibit under ordinary circumstances the transaction of other business within the State.[6]

Long ago in Bank of Augusta *v.* Earle[7] Chief Justice Taney,

[1] Pearce *v.* Ry. Co., 91 How. 341; Hill *v.* Nisbet, 100 Ind. 341; People *v.* Company, 121 N. Y. 582; 24 N. E. 834; L. & N. Ry. Co. *v.* Kentucky, 161 U. S. 677.

[2] L. & N. Ry. Co. *v.* Kentucky, 161 U. S. 677.

[3] Id.

[4] Matter of Prospect Park, etc. Ry. Co., 67 N. Y. 371; Toledo, etc. Ry. Co. *v.* Company, 95 Fed. 497; 36 C. C. A. 155; Lanman *v.* Company, 30 Pa. St. 42; Racine, etc. Ry. Co. *v.* Company, 49 Ill. 331.

[5] Ashley Wire Co. *v.* Company, 60 Ill. App. 179; City Bank *v.* Beech, 1 Blatchford, 425; Stickle *v.* Company (N. J. Eq.), 32 Atl. 708; Underwood *v.* Waldron, 12 Mich. 73; Berthin *v.* Company, 28 La. An. 210; Lane *v.* Bank, 9 Heisk. (Tenn.) 419.

[6] Potter *v.* Bank, 5 Hill (N. Y.), 490.

[7] 13 Peters, 519.

commenting upon the right of a corporation to transact business beyond the limits of the domiciliary State, spoke as follows:

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person for certain purposes in contemplation of law. . . . Natural persons through the intervention of agents are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place." [1]

The strictly legal existence of a corporation is confined to the State which created it, and it can exercise its powers in another State only by permission, express or implied, of the legislative power thereof; but the mere right to purchase and sell property will be recognized and protected in any State subject only to the limitations that the exercise of such right shall not be contrary to the laws or settled policy of the latter State or prejudicial to its interests or those of its citizens. Unless the Constitution or statutes declare a contrary rule, the courts of another State are bound to recognize the right of a foreign corporation to collect debts due to it, by receiving a conveyance of land.[2]

In order, however, to avoid complications that might possibly arise through hostile action on the part of stockholders or of foreign States, statutes have been enacted in a number of the Common-

[1] See Hall *v.* Company, 91 Ala. 363; 8 So. 348.

[2] Thompson *v.* Waters, 25 Mich. 214.

wealths expressly authorizing the transaction of business in foreign states and jurisdictions.[1]

Under the progressive incorporation acts in force in many of the States at the present time it is unquestionably permissible to organize corporations in one State for the exclusive purpose of transacting their entire business in other States and Territories.[2]

§ 22. **Power to perform Constituent Acts outside of the Domiciliary State.** — By constituent acts is meant such corporate transactions as are separate and apart from its ordinary business dealings with third parties; such, for example, as the organization of the corporation in the first instance, the adoption of by-laws, the issuance of stock certificates, the election of directors and officers, and the holding of stockholders' meetings.[3] As a general rule such constituent acts cannot be performed without the domiciliary State.[4]

The legislature may, of course, authorize the performance of constituent acts beyond the limits of the State. This has been done in a number of the Commonwealths.[5] It is probably safe to say that aside from organization meetings the presence of stockholders of the corporation at a meeting held without the State will estop them from attacking the validity of the proceedings had at such meeting.[6]

§ 23. **Power to extend Corporate Existence.** — In twenty-seven

[1] See Part III. Table 12, page 582. See Ashley Wire Co. *v.* Company, 60 Ill. App. 179; Kennebec Co. *v.* Company, 72 Mass. 204; Aspinwall *v.* Company, 20 Ind. 492; Blodgett *v.* L. Z. Company, 120 Fed. 893.

[2] Sec. Nat. Bank *v.* Hall, 35 O. St. 158; M. L. & S. Co. *v.* Reinhard, 114 Mo. 218; 21 S. W. 488; O. M. Co. *v.* Garst, 18 R. I. 484; 28 Atl. 973; People *v.* Company, 153 Ill. 25; 38 N. E. 752; Tilley *v.* Coykendall, 172 N. Y. 87; 65 N. E. 574; Minn., etc. Co. *v.* Denslow, 46 Minn. 171; 48 N. W. 771; Wright *v.* Lee, 2 S. D. 596; 51 N. W. 706; A., etc. R. R. Co. *v.* Fletcher, 35 Kan. 236; 10 Pac. 596; North, etc. Stock Co. *v.* People, 147 Ill. 234; 35 N. E. 608; Canada S. Ry. Co. *v.* Gebhard, 109 U. S. 527; 3 S. Ct. 363; Cowell *v.* Springs Co., 100 U. S. 55; Hastings *v.* Anacortes, etc. Co., 29 Wash. 224; 69 Pac. 776; Irvine Co. *v.* Bond, 74 Fed. 849.

[3] See McCall *v.* Company, 6 Conn. 428; Galveston, etc. Ry. Co. *v.* Cowdrey, 11 Wall. 459; 20 Law. Ed. 199.

[4] Commonwealth *v.* Smith, 45 Pa. St. 59; Smith *v.* Company, 64 Md. 85; 20 Atl. 1032; Tuckasegee Mining Co. *v.* Goodhue, 118 N. C. 981; 24 S. E. 797; Camp *v.* Byrne, 41 Mo. 525; F. T. L. Co. *v.* Laigle, 59 Tex. 339; Craig Co. *v.* Smith, 163 Mass. 262; 39 N. E. 1116; Bellows *v.* Todd, 39 Iowa, 209; Hodgson *v.* Company, 46 Minn. 454; 49 N. W. 197; Harding *v.* Company, 182 Ill. 551; 55 N. E. 577; Jones *v.* Company, 20 Col. 417; 38 Pac. 700; Mack *v.* Company, 90 Ala. 396; 8 So. 150; Aspinwall *v.* Company, 20 Ind. 492; Courtright *v.* Deeds, 37 Iowa, 503.

[5] See Part III. Table 11, page 581.

[6] Handley *v.* Stutz, 139 U. S. 417; Galveston, etc. Ry. Co. *v.* Cowdrey, 11 Wall. 459; see also Humphreys *v.* Mooney, 5 Col. 282.

of the Commonwealths perpetual existence is permitted in the incorporation of companies therein. The power to extend such existence is not of any material importance in these Commonwealths. Twenty-five of the incorporation acts specifically provide for the extension of corporate existence. Without such statutory authority corporate existence cannot be extended.[1]

In some of the States extension of corporate existence must be accompanied by the payment of an organization tax, as is the case of new corporations. Thus, in New Jersey, where such a provision exists, it has been held that such tax must be paid even though the extension of the corporate existence was obtained in the guise of an amendment to the charter.[2]

§ 24. **Power to change the Corporate Name.** — Without statutory authority so to do corporations cannot change their name.[3] If the proposed change of name conflicts with the name of an existing domestic corporation, State officials are justified in refusing to allow the certificate showing the adoption of the new name to be filed.[4]

Some of the States, as, for example, New York and California, only permit change of name by application to the courts.

§ 25. **Power to increase or decrease Capital Stock.** — A corporation has no implied power to either increase or decrease the capital stock.[5] Such power must be conferred in express terms by the incorporation act under which the corporation is organized.[6]

Power to increase or decrease capital stock vests in the stockholders and not in the directors.[7] Frequently incorporation acts provide that the stock shall not be diminished to less than the amount of the corporate debts. Such is the case in California and other States. Certificates of stock issued on a fictitious increase of stock are void.[8]

§ 26. **Power to issue Preferred Stock.** — Stockholders enjoying

[1] See Part III. Table 8, page 578; also *post*, sec. 120.

[2] National Lead Co. *v.* Dickinson (N. J.), 57 Atl. 138.

[3] Sykes *v.* People, 132 Ill. 32; 23 N. E. 391; C. D. & M. Ry. Co. *v.* Keisel, 43 Ia. 39; Glass Co. *v.* Company, 32 Ind 376.

[4] *In re* U. S. M. Rep. Agency, 115 N. Y. 176; 21 N. E. 1034; People *v.* Company, 111 Mich. 405; 69 N. W. 653.

[5] Ins. Co. *v.* Kamper, 73 Ala. 325; Pullman *v.* Upton, 96 U. S. 328.

[6] Sutherland *v.* Olcott, 95 N. Y. 93; Crandall *v.* Lincoln, 52 Conn. 73; G. L. & H. Insurance Co. *v.* Kamper, 73 Ala. 325; Palmer *v.* Bank, 72 Minn. 266; 75 N. W. 380; Detroit Chamber of Commerce *v.* State Secretary, 109 Mich. 691; 67 N. W. 897.

[7] C. C. Ry. Co. *v.* Allerton, 18 Wall. 233.

[8] Beitman *v.* Steiner, 98 Ala. 241; 13 Sou. 87.

preferential or additional rights not enjoyed by the holders of common shares are called "preferred stockholders." The issuance of preferred stock is a mode by which a corporation obtains funds for its enterprise, without borrowing money or contracting a debt.[1] The question as to whether or not preferred stock may be issued by corporations without express authority by law is a somewhat difficult one to settle. In twenty-five of the States[2] the question is settled by the existence of statutes expressly authorizing the issuance of preferred stock, and even in those States where no such statutes exist it is, with some few exceptions, the custom of the State officials to permit the insertion in the articles of incorporation of provisions authorizing the issuance of preferred stock. The action of such officials is certainly conclusive as against all the world except the State.[3]

The true rule governing the matter now before us is, in the opinion of the writer, best set forth in the case of Campbell *v.* American Zylonite Company.[4] In this case the articles of incorporation divided the capital stock of the corporation into shares, equal in amount and value. Some time after incorporation one of the stockholders executed a blank assignment of certain stock owned by him to a third party as security for a loan. Subsequently all the stockholders, except the owner of this pledged certificate, at a meeting duly called for that purpose, voted to surrender to the corporation, without consideration, forty per cent of their stock, and authorized the corporation to reissue this forty per cent in the form of preferred shares. The legality of this act was contested by the holder of the pledged certificate, and in passing upon the legal question involved, the court spoke as follows:

"The right of every shareholder to his proportion of the profits of the corporation was vested, and in the absence of some power to change the relative value of the shares conferred by statute or by the articles of incorporation, no change could be made without the consent of all the shareholders. . . . The assignee of shares having possession of the certificates, although holding under unregistered transfers, are not bound by contracts between the registered shareholders, the corporation and all the other shareholders which are not within the express or implied powers of corporations or of their shareholders. As between the assignor and the assignee, the unregistered

[1] Chaffee *v.* Company, 55 Vt. 110.
[2] See Part III. Table 8, page 578.
[3] See Hamlin *v.* R. R. Co., 78 Fed. 670.
[4] 122 N. Y. 455; 25 N. E. 853.

assignment was not void. It follows that the change in the relative value of the shares which this corporation and its registered shareholders sought to effect was not within the express or implied powers conferred upon the corporation or shareholders, and that their action is not binding upon the holder of the assigned certificate who did not consent to the issuance of the preferred shares."

In Kent *v.* Quicksilver Company[1] the court addressing itself to the question now before us, spoke as follows:

"There arises the query whether there was power in the corporation to distinguish between the stockholders in it to form them into two classes, and to give to one class rights in the corporate property and business and earnings from which the other was shut out. We are not prepared to say that at the first the corporation might not have lawfully divided the interest in its capital stock into shares arranged in classes, preferring one class to another in the right which they should have in the profits of the business. The charter gave power to make such by-laws as it might deem proper consistent with Constitution and law. We know of nothing in the Constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares of its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake, there would be no treading upon rights previously acquired; no contract, express or implied, would be broken or impaired. Shares of stock are in the nature of choses in action, and give the holder a fixed right in the division of profits or earnings of the company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened against the will of the owner than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right; or is properly derived afterward from a superior law giver. It is manifest that any action of a corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners, and divides them into two classes, — one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterward with the other in what earnings may remain, — destroys the equality of the shares, takes away a right

[1] 78 N. Y. 167.

which originally existed in it, and materially varies the effect of the certificate of stock. It is said that when a corporation can lawfully buy property or get money on loan, any known assurance may be exacted and given which does not fall within the prohibition, express or implied, of some statute. But the prohibition to such action as this is found not, indeed, in a statute commonly so called, but in the constitutional provision which forbids the impairment of vested rights, save for public purposes and on due compensation. The right which a stockholder gets on the purchase of his share, and the issue to him of the certificate therefor, is such a vested right. It is contended that the power so to do is an incidental and implied power necessary to the use of the other powers of the corporation, and is a legitimate means of raising money before securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money and to secure the repayment of it with a compensation for the use of it. But that is when it is done in such way as to put the burden upon every share of stock alike, and to enable every share of stock to be relieved therefrom alike; in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholders.

"We are, therefore, of the opinion that there was no power in the corporate body, nor in a majority of the stockholders, to provide by by-law for the creation of a preferred stock, so as to bind a minority of the stockholders not assenting thereto."

In what has been stated a most important principle has been referred to, which, it is believed, is controlling upon the question at hand. This principle to which reference is here made is that the charter proceeds from the State, and that nothing can be legally done by the corporation acting through its stockholders not authorized either by statute or by the charter itself. Thus it is clear that in these States where the statutory right to issue preferred stock is not granted and the charter itself only provides for common stock, no preferred stock can be legally issued by the stockholders as against the State, except by amending the charter itself. This, too, even where the stockholders consent.[1]

This question is likely to be presented in a troublesome form where common stock has been pledged to creditors before the preferred stock was issued.[2]

From a careful examination of the authorities it may be said

[1] Knoxville, etc. Co. *v.* City of Knoxville, 98 Tenn. 1; 37 S. W. 883.

[2] See generally Lockhart *v.* Van Alstyne, 31 Mich. 76; McGregor *v.* Insurance

that in order to constitute an issue of preferred stock valid as against all the world, there must be a statute authorizing it, or provision therefor inserted in the charter. To make the issue valid as against all but the State, the consent of all of the holders of common stock to the issuance of preferred stock is, doubtless, all that is necessary.[1] It is hardly necessary to add, in addition to the foregoing, that the total amount of common stock added to the preferred stock so issued must not in any case exceed the total authorized capital stock of the corporation.

The rights of holders of preferred stock depend upon the terms of the statute or of the charter or by-law authorizing it.[2] Ordinarily the power to authorize the issuance of preferred stock vests in the stockholders and not in the directors.[3]

Where a portion of the stock of the corporation is issued as preferred, no creditor of the corporation can object, provided the money paid for the stock reaches the treasury of the corporation, and the dividends on the stock are not to be paid except out of net profits.[4] Unless the statute provides otherwise, preferred stockholders may be deprived of the right which they would otherwise have, to vote their stock in the same manner as common stockholders.[5] This is commonly done either by charter provision or by a by-law adopted before any preferred stock is issued.

Preferred stock cannot be lawfully issued with the provision that it shall bear interest absolutely.[6] In order to make preferred stock a lien upon the corporate assets statutory authority is necessary.[7]

Co., 33 N. J. Eq. 181; Higgins *v.* Lansingh, 154 Ill. 301; 40 N. E. 362; Covington, etc. Co. *v.* Sargent, 1 Cinn. Sup. Ct. 354; Elevator Co. *v.* Memphis, etc. Co., 85 Tenn. 703; 5 S. W. 52; March *v.* Eastern R. R. Co., 43 N. H. 515; Bates *v.* Androscoggin, etc. R. R. Co., 49 Me. 491; Pronty *v.* Mich., etc. R. R. Co., 1 Hun, 655; Kent *v.* Quicksilver Min. Co., 12 Hun, 53; Jones *v.* Terre Haute, etc. Co., 57 N. Y. 196; Hoyt *v.* Quicksilver Mining Co., 78 N. Y. 159; s. c. 9 Week. Digest, 187, aff'g 17 Hun, 169; Curry *v.* Scott, 54 Pa. St. 270; Sturges *v.* E. Un. Ry. Co., 7 De Gex, M. & G. 158; Matthews *v.* Gt. Northern R. R. Co., 28 L. J. Ch. 375; Green's Brice Ultra Vires, 145; Hutton *v.* Scarborough Hotel Co., 2 Drew & Sim. 514; Hook *v.* Gt. Western Ry. Co., 3 L. R. Ch. 262; Henry *v.* Gt. Northern Ry. Co., 4 K. & J. 1; 27 L. J. Ch. 1; Corry *v.* Londonderry, etc. Co., 29 Beav. 272; 3 L. J. Ch. 290; Coates *v.* Nottingham Water Works Co., 30 Beav. 86.

[1] Higgins *v.* Lansingh, 154 Ill. 301; 40 N. E. 362.

[2] Scott *v.* B. & O. R. R. Co., 93 Md. 75; 49 Atl. 327.

[3] See Coit *v.* Freed, 15 Utah, 426; 49 Pac. 533.

[4] First Nat. Bank of Peoria *v.* Peoria Watch Co., 191 Ill. 128; 60 N. E. 859.

[5] Lockhart *v.* Van Alstyne, 31 Mich. 76; Mackintosh *v.* Company, 32 Fed. 350; Miller *v.* Ratterman, 47 O. St. 141.

[6] Winscott *v.* Investment Co., 63 Mo. Ap. 367.

[7] Continental Trust Co. *v.* Toledo, etc. Ry. Co., 72 Fed. 92.

§ 27. **Power to change the Corporate Purposes.** — In the early days the right of amendment, when the same related to altering the original purposes of corporations, was jealously guarded and limited both by statute and by judicial construction. In later years there has been evinced greater liberality in this regard, as evidenced by granting to corporations unlimited power of amendment.[1] The only real difficulty in this connection arises when an attempt is made to so completely change the original purposes for which a corporation was formed as in effect to create a new corporation. Under the Pennsylvania Incorporation Act governing amendments, it was held that this could not be done.[2]

The present attitude of the courts on this subject is well shown by a recent New Jersey decision, — that of Meredith *v.* New Jersey Zinc & Iron Company.[3] In this case the right of amendment, even when producing fundamental changes in the corporate purposes, was sustained.[4]

It appears clear that under the liberal power of amendment existing to-day in the majority of the States, any changes may be made, no matter how fundamental, by the consent of all the stockholders. And where the matter is simply one between the corporation and the State, the right to make such an amendment cannot, in the States referred to, be questioned when adopted by the requisite number of stockholders.

§ 28. **Power to change Number of Directors.** — Only in those States where the number of directors is required to be fixed in the articles, is it necessary to have statutory authority to change the same. In other States the matter of amendment may be regulated by the by-laws. However, in the larger number of the Commonwealths, the power to amend the articles with reference to changing the number of directors is required to be based upon express statutory authority so to do.[5]

[1] See Part III., Table 8, page 578.

[2] *In re* Pennsylvania Bottling Co., 19 Pennsylvania County Court Reports, 593. See also State *v.* Taylor, 53 Iowa, 759; 6 N. W. 39.

[3] Meredith *v.* Company, 59 N. J. Eq. 257; 44 Atl. 55. See also sec. 112, *post*.

[4] See also Grand River College *v.* Robertson, 67 Mo. App. 329; Mercantile Statement Co. *v.* Kneal, 51 Minn. 263; 53 N. W. 632; Bowie *v.* Grand Lodge, 99 Cal. 392; 34 Pac. 103; Day *v.* Company, 75 Ia. 694; 38 N. W. 113; Stickle *v.* Liberty Cycle Mfg. Co. (N. J. Eq.), 32 Atl. 708; Banet *v.* Company, 13 Ill. 504; Ross *v.* Company, 77 Ill. 134; Pac. Ry. Co. *v.* Renshaw, 18 Mo. 210; Ashton *v.* Burbank, 2 Dill. (U. S.) 435; Del. Ry. Co. *v.* Thorp, 1 Hurst (Del.), 149; M. B. Ry. Co. *v.* Sullivan, 37 Ga. 240; Com. *v.* Cullen, 13 Pa. St. 133.

[5] See Part III. Table 16, page 586; also see Matter of Griffing Iron Co., 63 N. J. Law, 168; 41 Atl. 9311; 63 N. J. Law, 357; 46 Atl. 1097.

§ 29. **The Power to change the Corporate Domicile and Principal Place of Business.** — As will hereafter be seen, it is essential to corporate existence that the corporation should have a home.[1] It is the naming of the domiciliary office in the articles which fixes the residence of the corporation for jurisdictional purposes, and fixes the usual place for holding stockholders' and directors' meetings. If it is desired to change the domicile, or if the location of the corporation's principal place of business is to be transferred from one place to another, an amendment to the articles must be had under legislative sanction.[2] It should, however, be noted in this connection, that the corporation's domicile and its principal place of business are not necessarily one and the same thing.[3]

Again, if, as is the case in some States, the name of the agent upon whom process upon the corporation may be served, is required to be set forth in the articles, in order to lawfully substitute a new agent, an amendment to the articles is necessary, made pursuant to statutory authority given in the premises.[4]

§ 30. **Power to acquire and enforce a Lien upon Stock to secure the Payment of Debts Due the Corporation.** — In a large number of the States statutes exist expressly granting to corporations the right to enforce a lien upon the stock of its members for the purpose of securing the payment of debts due from such members to the corporation.[5]

The courts are not by any means in entire agreement as to whether statutory authority to enforce such a lien is essential to its validity. Some courts, of excellent repute, maintain the affirmative, and others take the opposite view.[6] It seems fairly certain that at common law such a right did not exist.[7]

The true view appears to be that while at common law a corporation had no lien on the shares of its capital stock for the debts due it from the stockholders, nevertheless such a lien may be acquired either when given by statute or when such right is

[1] See *post*, sec. 54.

[2] See Stickle *v.* Liberty Cycle Mfg. Co. (N. J. Eq.), 32 Atl. 708; Kennett *v.* Company, 68 N. H. 432; 39 Atl. 585; Harris *v.* McGregor, 29 Cal. 124.

[3] Van Etten *v.* Eaton, 19 Mich. 187; McConnell *v.* Company (Mont.), 74 Pac. 194.

[4] See Johnson *v.* Mason Lodge, 21 Ky. Law Rep. 493; 51 S. W. 620.

[5] See Part III. Table 9, page 579.

[6] Costello *v.* Company, 69 N. H. 405, 43 Atl. 640; Young *v.* Vough, 23 N. J. Eq. 325; Moore *v.* Bank, 52 Mo. 377; *In re* Klaus, 67 Wis. 401; 29 N.W 582; Farmers', etc. Bank, *v.* Wasson, 48 Ia. 336; Cont. T. R. Co. *v.* Toledo, etc. Ry. Co., 72 Fed. 92.

[7] Brinkerhoff, etc. Co. *v.* Company, 118 Mo. 447; 24 S. W. 129.

preserved by inserting provisions therefor in the Articles of Incorporation, or by the passage of a valid by-law, or by inserting a provision therefor in the stock certificates.[1]

§ 31. **Power to levy Assessments against the Stockholders with the Right to forfeit their Stock for Non-payment thereof.** — With some few exceptions the right to forfeit stock for non-payment of valid assessments levied against it is preserved by statute in most of the States and Territories.[2] Even in the absence of such statute the right to forfeit stock for non-payment of valid assessments when given to the corporation by its by-laws will probably be enforced by the courts. In any event the common law remedy would exist, giving the corporation the right to recover judgment against the delinquent stockholders for the amount of such assessments.[3]

In all cases the right to forfeit stock is considered to be merely a cumulative remedy.[4] The right to levy assessments upon stockholders does not exist after payment by such stockholders for their stock in full, unless the power to do so is conferred either by statute, by the articles of incorporation, or by the unanimous consent of all the stockholders.[5] But even in the absence of express power to declare a forfeiture of stock for non-payment, a corporation may sue for amount of subscription to the capital stock, and on failure to collect the amount subscribed may secure payment by sale of stock subscribed.[6]

On the general subject of assessments the following may be said: provisions for the forfeiture of capital stock for the non-payment of assessments must be just and reasonable in order to be valid.[7] The terms of the statute in any event must be strictly complied with.[8] The power to levy assessments rests in the directors by virtue of their office and not in the stockholders.[9] Even where

[1] Union Bank *v.* Laird, 2 Wheaton (U. S.), 390; St. Louis Per. Ins. Co. *v.* Goodfellow, 9 Mo. 149; Van Sands *v.* Bank, 26 Conn. 144; Sargent *v.* Insurance Co., 25 Mass. 90. See also Atchison Bank *v.* Durfee, 118 Mo. 431; 24 S. W. 133; V. G. B. Co. *v.* Bloede, 84 Md. 129; 34 Atl. 1127; Bishop *v.* Globe Co., 135 Mass. 132.

[2] See Part III. Table 17, page 587.

[3] San Joaquin *v.* Beecher, 101 Cal. 70; 35 Pac. 349.

[4] M. F. & N. Co. *v.* Hall, 121 Mass. 272; Raymond *v.* Caton, 24 Ill. 123; Lesseps *v.* Architects' Co., 4 La. Ann. 316.

[5] Enterprise Ditch Co. *v.* Moffitt, 58 Neb. 642; 79 N. W. 560; Duluth Club *v.* McDonald, 74 Minn. 254; 76 N. W. 1128; State *v.* Association, 23 N. J. Law, 195; Sullivan Co. Club *v.* Butler, 26 N. Y. Miscellaneous Reports, 306; Mayberry *v.* Meade, 80 Me. 27; 12 Atl. 635; Price's Appeal, 106 Pa. St. 421; Weeks *v.* Company, 55 N. Y. Sup. Ct. 1.

[6] Chase *v.* Company, 5 Lea (Tenn.), 415.

[7] Crissey *v.* Cooke, 67 Kan. 20; 72 Pac. 541.

[8] P. G. T. R. Co. *v.* Graham, 11 Metcalf, 1.

[9] Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286.

the statute expressly gives power to the stockholders to levy assessments they may doubtless delegate this power to directors.[1] Directors, however, cannot lawfully delegate such power to ministerial officers.[2]

§ 32. **Power to authorize Voting by Proxy at Stockholders' Meetings.** — At common law the right of stockholders to vote by proxy was not recognized. The right in order to be available must be granted either by statute, charter, or appropriate by-law.[3] Voting by proxy is not however *per se* unlawful.[4] Therefore the right may be secured to stockholders by appropriate by-law duly passed even without a statute authorizing it.[5]

§ 33. **Power to permit Cumulative Voting at Election of Directors.** — The right of cumulative voting exists where a stockholder has a number of votes equal to the number of shares held by him multiplied by the number of directors to be chosen, and is allowed to cast or distribute them as he sees fit. The purpose thereof is to secure minority representation on the board of directors. To authorize cumulative voting the right must be preserved either by constitutional, statutory, or charter provision or by the passage of a by-law looking to that end.[6]

If the right is conferred absolutely by constitutional or statutory provision, it cannot be taken away by means of a by-law or resolution denying such right to stockholders.[7]

In twenty-one of the Commonwealths the right to cumulate votes is secured to stockholders either by constitutional enactment or by statutory provision.[8]

§ 34. **Power to issue Stock as full paid in Exchange for Property or Services.** — In the quaint wording of an English case, "stock must be paid for, in the absence of constitutional or statutory provision providing otherwise, "in meal or in malt;" that is, in money or in money's worth.[9] Forty of the States have enacted laws authorizing the payment of stock not only in cash but in

[1] Rives *v.* Company, 30 Ala. 92.

[2] *In re* County Palatine L. & D. Co., L. R. 9 Ch. 691.

[3] Harvey *v.* Company, 118 N. C. 693; 24 S. E. 489; People *v.* Crossley, 69 Ill. 195; McKee *v.* Company (Ia.), 98 N. W. 609.

[4] M. & O. Railroad Co. *v.* Nicholas, 98 Ala. 92; 12 Sou. 723.

[5] State *v.* Tudor, 5 Day (Conn.), 329; Commonwealth *v.* Detwiler, 131 Pa. St. 614; 18 Atl. 990.

[6] Pierce *v.* Commonwealth, 104 Pa. St. 150; Schmidt *v.* Mitchell, 101 Ky. 570; 41 S. W. 929; State *v.* Stockley, 45 O. St. 304; 13 N. E. 279; State *v.* Greer, 78 Mo. 188; Baker's Appeal, 109 Pa. St. 461.

[7] Tomlin *v.* Bank, 52 Mo. App. 430; Commonwealth *v.* Yetter, 190 Pa. St. 488; 43 Atl. 226.

[8] See Part III. Table 9, page 579.

[9] Drummond's Case, L. R. 4 Ch. 772.

services or property.[1] Some of the States — for example, Alabama and Virginia — have somewhat elaborate provisions on the subject.

Thus, in Alabama, stock may be issued in exchange for all such real and personal property as may be necessary or convenient for the efficient construction, operation, and maintenance of its works or plants, lines, shops, factories, or other buildings, or for the conduct and management of its business or as its purposes may require.[2]

In Virginia the new Incorporation Act authorizes subscriptions to the capital stock to be paid for in money, land, or other property, real or personal, leases, options, mines, minerals, mineral rights, patent rights, rights of water or easements, contracts, labor, or services.[3]

Even in those few Commonwealths where no statutes exist authorizing the payment of stock in property or services, the courts will presume that corporations have inherent power to purchase property and labor and pay for the same in stock instead of money, provided the transaction whereby the stock is to be issued in exchange for such property or services is made in good faith and no fraud is perpetrated upon stockholders or creditors.[4]

The statute to prohibit absolutely the payment of subscriptions to the capital stock in property or services must be clearly restrictive in character.[5] The only effect apparently of the absence in particular Commonwealths of any provision, constitutional or statutory, authorizing the payment of stock in property or services, is to induce the courts to adopt what is known as the "true value rule"[6] rather than the "good faith rule."[7] But in the Commonwealths referred to, the character of the property, labor, or services accepted in exchange for stock must be strictly such as the corporation under its charter has the power to acquire, and when property is so taken it must be fairly represented to the corporation and for a just, lawful, and needed equivalent for the money subscribed.[8]

[1] See Part III. Table 10, page 580.

[2] See Alabama Session Laws, 1903, p. 395, sec. 7, subdiv. c.

[3] See Session Laws of Virginia, 1903, chap. 270.

[4] Liebke *v.* Knapp, 79 Mo. 22; Beach *v.* Smith, 30 N. Y. 116; Shannon *v* Stevenson, 173 Pa. St. 419; 34 Atl. 218.

[5] See Knox *v.* Company, 86 Ala. 180; 5 So. 578.

[6] See *post*, sec. 104.

[7] See *post*, sec. 105.

[8] Liebke *v.* Knapp, 79 Mo. 22; Powell

§ 35. **Power to dispose of Corporate Assets as an Entirety.** — In ten of the Commonwealths express power is conferred upon corporations to dispose of their entire corporate assets by obtaining the consent of a certain percentage of the stockholders to such disposition.[1] Much controversy has arisen as to whether or not express statutory power is necessary in order to authorize transfer by a corporation of the entire corporate assets. At common law neither the directors nor a majority of the stockholders had power to sell or otherwise transfer all of the property of an acting and prosperous corporation able to achieve the objects of its creation as against the dissent of a single stockholder.[2]

The view is taken by the New Jersey court in Coler *v.* Company[3] that the sale of the corporate assets as an entirety is equivalent to a dissolution, and therefore can only be done through the courts under statutory authority. Many courts, however, take the view that it can be done where it is not in fraud of the rights of creditors or in violation of charter or statutory restrictions, and this, too, by a majority of the stockholders against the dissent of a minority where the exigencies of the business seem to require it.[4] Thus, it has been asserted that "it is a well settled rule that a strictly private corporation has the same right to dispose of its property that an individual has, and that when insolvent or in a failing condition it may sell all thereof without the consent of all of the stockholders. It is the general rule, however, that neither the directors nor a majority of the stockholders of a corporation have power at common law to sell or otherwise transfer all its property while the corporation is a going, prosperous concern against the dissent of any shareholder."[5]

It may be added in this connection that the right to exist as a

v. Murray, 3 N. Y. App. Div. 273; 38 N. Y. Sup. 233; Id. 157 N. Y 717; 53 N. E. 1130; Kimball *v.* Company, 69 N. H. 485; 45 Atl. 253; Montgomery *v.* Company, 48 N. Y. App. Div. 12; 62 N. Y. Sup. 606; Id. 168 N. Y. 657; 61 N. E. 1131.

[1] See Part III. Table 9, page 579.

[2] Forrester *v.* Company, 21 Mont. 544; 55 Pac. 229; Idem, 74 Pac. 1088; People *v.* Ballard, 134 N. Y. 269; 32 N. E. 54; California Bank *v.* Kennedy, 167 U. S. 362; 42 L. E. 198; B. & M. C. C. & S. M. Co. *v.* M. O. P. Co., 89 Fed. 529; Metcalf *v.* A. S. F. Co., 122 Fed. 115; Traer *v.* Company (Ia.), 99 N. W. 290.

[3] 64 N. J. Eq. 117; 53 Atl. 680.

[4] Treadwell *v.* Company, 7 Gray (Mass.), 393; Martin *v.* Zellerbach, 38 Cal. 300; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543; Featherstonhaugh *v.* Company, L. R. 1 Eq. 318; Bartholomew *v.* Company, 69 Conn. 521; 38 Atl. 45.

[5] Traer *v.* Company (Ia.), 99 N. W. 290.

corporation is not alienable.[1] The sale of all the corporate property does not operate to dissolve the corporation.[2]

§ 36. **Power to voluntarily dissolve the Corporation without Recourse to the Courts.** — The dissolution of a corporation is a peculiar function that rests primarily in the legislature, and is conferred upon courts or upon the corporation itself, only by explicit legislative authority.[3] Stockholders, in the absence of statutory provision, cannot extinguish the corporate charter or dissolve the corporation, nor can a court of equity accomplish a similar result at their instance.[4] In all the States some provision is made for dissolution of corporations. For example, in Alabama, Connecticut, New Jersey, North Carolina, Virginia, and West Virginia the incorporators have the right to surrender the charter before organization. In twenty-seven of the Commonwealths corporations may be dissolved under statutory authority without recourse to the courts.[5]

The doctrine that dissolution can only be effected by the joint act of the State and corporation is set forth in a Massachusetts case as follows:[6] "Charters are in many respects compacts between government and corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of the charter can only be made by the formal act of the corporation; and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. Dissolution of a corporation, it is said, extinguishes all its debts. The power to dissolve itself by its own act would be a dangerous power, and one which cannot be supposed to exist."[7]

In this connection it may be observed that the stockholders

[1] Detroit Citizens' Street Ry. Co. *v.* Common Council, 125 Mich. 673; 85 N. W. 96; Pearce *v.* R. R., 21 How. 441; 16 L. E. 184; State *v.* Company, 40 Kan. 96; 19 Pac. 349.

[2] Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543; Sullivan *v.* Company, 39 Cal. 459.

[3] Olds *v.* Company (Mass.), 70 N. E. 1022.

[4] Benedict *v.* Company, 49 N. J. Eq. 235; 23 Atl. 485.

[5] See Part III. Table 8, page 578.

[6] Boston Glass Manufactory Co. *v.* Langdon, 24 Pick. 49.

[7] See also Davis *v.* Company, 87 Ala. 633; 6 Sou. 140.

alone have power to surrender the charter.[1] It will be remembered, of course, that the expiration of the time limited by the charter as a corporation's term of existence is held in most jurisdictions to result in the dissolution of such a corporation.[2] But neither insolvency nor sale of all of the corporate property, nor cessation of business operates to dissolve the corporation.[3]

But in the absence of any provision in the charter limiting corporate existence, the corporation is entitled to perpetual life.[4] If the articles provide for a longer period of corporate existence than the law allows, the excess is void.[5] In many of the States statutes exist providing that the corporation shall continue in existence for periods ranging from three to five years after the expiration of the time limited for its existence for the purpose of winding up its affairs.[6]

A majority of the States delegate to the courts the power to dissolve the corporation on application of stockholders or creditors.[7] The fact that certain States make the directors trustees for creditors on dissolution does not necessarily take away the jurisdiction of courts of equity to appoint a receiver.[8] Many States have statutes providing that upon the expiration of the time limited by their charter as the duration of their corporate existence, they shall nevertheless be continued for a certain period of time in order to permit of the winding up of the corporate affairs. Without such statutory provisions suits cannot be maintained against the corporation after such period has expired.[9]

§ 37. **Power to insert in the Charter Provisions for the Regulation of the Internal Affairs of the Corporation.** — The incorporation acts of eighteen of the States contain provisions relative to the contents of certificates of incorporation, authorizing the insertion therein of provisions for the regulation of the business of the corporation, or for the purpose of defining or limiting the powers of the corporation, its officers, directors, and stockholders.[10]

[1] Jones *v.* Bank, 10 Col. 464; 17 Pac. 272; Barton *v.* Association, 114 Ind. 226; 16 N. E. 486.

[2] Mason *v.* Company, 25 Fed. 882.

[3] Davis *v.* Company, 87 Ala. 633; 6 So. 140.

[4] F. L. S. Co. *v.* Clowes, 3 N. Y. 470.

[5] People *v.* Cheeseman, 7 Col. 376; 3 Pac. 716.

[6] See Part III. Table 17, page 587; see also Foster *v.* Bank, 16 Mass. 245; Nashville Bank *v.* Petway, 3 Hum. (Tenn.) 522.

[7] See Miner *v.* Company, 93 Mich. 97; 53 N. W. 218; Wheeler *v.* Company, 143 Ill. 197; 32 N. E. 420.

[8] City Pottery Co. *v.* Yates, 37 N. J. Eq. 543.

[9] Nelson *v.* Hubbard, 96 Ala. 238; 11 Sou. 428.

[10] See Part III. Table 10, page 580.

Unless the law expressly permits the insertion of such provisions in the certificate of incorporation, State officials are justified in refusing to accept and file certificates containing such provisions. This generally on the ground that in the absence of statutory provision so authorizing, they are properly the subject of by-laws and not proper for insertion in the certificate of incorporation.[1]

Leaving out of consideration the fact of acceptance by State officials, and approval by them of certificates of incorporation containing such provisions as are here referred to, when there is no statute authorizing the same, the following may be said: The general test as to whether provisions not called for by the statutes are valid when inserted in certificates of incorporation must be determined from their character. If they are not powers, but are merely in the nature of by-laws, they are invalid as not being called for by the statute. If they are powers, but not authorized by statute, to permit such insertion in the certificate of incorporation would be equivalent to saying that the legislature had clothed the incorporators with a number of their legislative functions.[2] On this general subject the opinion of the Supreme Court of Alabama in a leading case in that State is instructive: "It is apparent," observes the court, "that the creation of corporations under general law rather than by special act was not intended to work any essential change in their nature and character. Whether deriving existence from a special law, or from incorporation under the general law, the corporation is an artificial being of legislative creation, having no other powers or properties than such as the law confers, or which may be incidental to their very existence. The mode of incorporation the statutes have carefully prescribed. The persons proposing to be incorporated must file and cause to be recorded in a designated public office a declaration in writing, stating the name of the corporation, the objects for which it is formed, the amount of the capital stock, the number of shares into which it is divided, the names of the stockholders, and the number of shares each may hold. The office and the effect of the declaration the statutes do not leave in doubt —

[1] *In re* Application for charter, 10 Phil. Rep. 130; Van Pelt *v.* Gardner, 54 Neb. 701; 75 N. W. 874; Bent *v.* Underdown, 60 N. E. 307; 156 Ind. 516; Heck *v.* McEwen, 12 Lea, 97; T. A. L. Co. *v.* Massey, 56 S. W. 35; E. P. R. Co. *v.* Vaughan, 14 N. Y. 546; G. L. D. Co. *v.* Perkins (Texas), 26 S. W. 256; Albright *v.* Association, 102 Pa. St. 411; Shoun *v.* Armstrong (Tenn.), 59 S. W. 790.

[2] People *ex rel. v.* C. G. T. Co., 130 Ill. 268; 22 N. E. 798.

when recorded, the persons signing it and their successors become a body corporate by the name stated therein and with the powers conferred by law. It is an acceptance by the corporation, under the name designated, for the objects expressed, of the corporate powers and capacity the law confers, and a statement of the principal constituents of the corporation, — the amount of the capital stock, the names of the stockholders, and the quantity of interest each has in the capital stock. There is no authority of law for introducing more into it, and if more be introduced, it is mere surplusage, not adding to or detracting from the force of the declaration. A controlling purpose, as we suppose, in authorizing or in compelling the creation of corporations under general laws, is to secure uniformity and equality of corporate powers, functions, and privileges; that all corporations of the same class, formed for like purposes, should possess the same capacities and properties, and exercise and enjoy the same franchises and privileges. Unless it was intended to work a radical change in the nature and character of these artificial beings, the mere creatures of the law, and to subvert the whole theory which has prevailed in reference to them, it cannot have been contemplated that they should for themselves create powers and privileges by declaration or reservation, whether the declaration or reservation is expressed in the articles of incorporation or in the by-laws ordered by the corporators for their government. Such declarations or reservations would soon become more liberal and diverse than was the liberality and diversity of the grants of corporate powers by special legislative enactment, the evil it was intended to remove. Of every corporation formed under the general law, the law itself becomes the charter, defines and enumerates the powers which are to be exercised, the nature and extent of corporate franchises and privileges. The declaration of incorporation, the by-laws adopted for corporate government, do not form the charter, or define or enumerate the corporate powers. These are the acts of the corporators. The charter is the grant from the sovereign power of the State, and by that source only can be varied or enlarged."[1]

§ 38. **Power to authorize Directors to adopt By-Laws.** — In a number of the States statutes exist authorizing the directors to adopt by-laws under certain conditions. The conditions here re-

[1] G. L. & H. Ins. Co. *v.* Kamper, 73 Ala. 325.

ferred to are usually either that the right referred to should be expressly inserted in the certificate of incorporation, or, in lieu thereof, that the stockholders expressly delegate this power to the directors.[1] Unless the statute or charter provides otherwise, the by-laws must be adopted by the stockholders.[2] However, where the right to adopt by-laws is expressly limited to the directors, it is exclusive.

§ 39. **Power to authorize Appointment of Executive Committee from the Board of Directors.** — In Connecticut, Delaware, Massachusetts, Nevada, New Jersey, Virginia, and West Virginia statutes exist expressly authorizing directors to appoint an executive committee from their own number to whom may be delegated, to such extent as shall be provided in the by-laws, any of the powers of the board of directors. There has as yet been no fair test in the courts as to the validity of such statutes where an attempt has been made by the directors to practically delegate all their powers to an executive committee. A reasonable view of the matter would seem to be that where the statute clearly conveys such power it is valid when exercised by an executive committee duly appointed from the full board of directors pursuant to the statute in such case made and provided.[3]

The power of the board of directors is not a delegated authority, and when the transaction of the business of the company will be facilitated by the appointment of an executive committee such appointment may unquestionably be made.[4]

§ 40. **Power to enlarge or diminish Corporate Powers.** — The right here referred to becomes one of importance only in those States wherein it is permitted to insert specific corporate powers in the articles of incorporation. The powers here referred to are such, for example, as the right of the corporation to acquire its own stock; to hold stock and bonds in other corporations; to delegate to directors power to adopt by-laws, etc. It will be found that wherever such a right exists the power to amend will be found sufficiently broad to permit of the enlargement or diminishing of

[1] See Part III. Table 12, page 582.

[2] See Norton, etc. Co. *v.* Wysong, 51 Ind. 4; Salem Bank *v.* Bank, 17 Mass. 1; Watson *v.* Company, 56 Mo. App. 145; State *v.* Curtis, 9 Nev. 325.

[3] S. E. L. Co. *v.* Bank, 127 N. Y. 517; 28 N. E. 467; Black, etc. Co. *v.* Holway, 85 Wis. 344; 55 N. W. 418; Andres *v.* Fry, 113 Cal. 124; 45 Pac. 534; Bank *v.* Walton Iron Co., 30 Bull. (Ohio) 382.

[4] Leavitt *v.* Company, 3 Utah, 265; 1 Pac. 356.

corporate powers by complying with the terms of the statute relative to such amendments.[1]

§ 41. **Power to change Par Value of Shares.** — Where the charter fixes the number and par value thereof, a corporation cannot increase or diminish the par value of its shares without legislative sanction.[2] If however the certificate of incorporation says nothing as to the number and par value of shares, they may doubtless be changed by the stockholders of the corporation without legislative sanction.[3]

The legal effect of a change in the number of shares without any corresponding increase or decrease in the par value thereof, is to increase or decrease the capital stock, and this can only be done by permission of the legislature.[4]

In thirty-six of the States the par value of the capital stock may be any amount, while in the remainder such par value is limited from amounts ranging from one dollar to one hundred dollars per share.[5] In some few of the States it will be noted that the provisions of the statutes limiting amendments fail to authorize changes in the par value of the shares of capital stock.[6]

§ 42. **Power of Bondholders to vote at Election of Directors.** — Very few of the States have enacted statutes giving to bondholders the right to participate in the election of directors. Virginia and Delaware are the exceptions to the general rule. Most of the States provide that the board of directors shall be elected by the stockholders, and thus by implication forbid the giving of the right to bondholders to vote at such election.[7] However, if neither by constitutional or statutory provision bondholders are barred from participating in the election of directors, such right may be bestowed upon them either by provision therefor in the charter or by proper by-law duly adopted.[8]

§ 43. **Power to classify Directors.** — Ordinarily the tenure of directors is fixed by statute, and where so fixed these provisions are of course controlling. If the statute requires directors to be elected

[1] Peoria, etc. Co. *v.* Preston, 35 Ia. 115; P., etc. P. R. Co. *v.* Griffin, 21 Barb. 454; Pac. R. Co. *v.* Hughes, 22 Mo. 291.

[2] Droitwich Patent Salt Co. *v.* Curzon, L. R. 3 Ex. 35; Tschumi *v.* Hills, 6 Kan. App. 549; 51 Pac. 619; S. M. D. Cor. *v.* Ropes, 6 Pick. (Mass.) 23.

[3] S. & K. Ry. Co. *v.* Cushing, 45 Me. 534.

[4] Droitwich Patent Salt Co. *v.* Curzon, L. R. 3 Ex. 35.

[5] See Part III. Table 4, page 565.

[6] See Part III. Table 14, page 575.

[7] Durkee *v.* People, 155 Ill. 354; 40 N. E. 626.

[8] State *v.* McDaniel, 22 O. St. 354.

annually, this by implication prohibits the classification of directors for terms in excess of the statutory limit.[1] In a large number of the States statutes exist expressly authorizing classification of directors.[2]

If the statute does not require annual election of directors, there would appear to be nothing illegal in a corporation's classifying its directors in any manner it sees fit so to do, provided (in the absence of statutory regulations) directors hold their office at the pleasure of the corporation.

§ 44. **Power to amend Articles before Organization.** — As has already been seen, the power to amend, if it exists at all, must be derived from the legislature. Very few of the Commonwealths have granted to incorporators the right to amend articles of incorporation before organization. Statutes, however, to that effect exist in Alabama, Connecticut, New York, New Jersey, North Carolina, and Virginia.

§ 45. **Power to surrender Charter before Organization.** — It is often an advantage to a corporation which does not care to avail itself of the right to actively engage in business, to surrender its charter to the State before organization, without going through the expensive and usually complicated proceedings incident to dissolution. Such right is expressly given in Connecticut, New Jersey, North Carolina, Virginia, and West Virginia.[3]

§ 46. **Power given to Minority Stockholders to compel Purchase of their Holdings upon Consolidation.** — In the States of Alabama, Connecticut, Massachusetts, Delaware, and New York statutory protection is afforded to minority stockholders in case the corporation has consolidated with another. The Connecticut statute may be briefly summarized as an example of such statutes.[4]

The act provides that any stockholder in any corporation consolidating, who at the time of such consolidation objects thereto in writing, may, within ten days after the agreement of consolidation has been filed for record in the office of the Secretary of State, demand in writing from the consolidated corporation payment of his stock; and such corporation shall within three months thereafter pay him the value of his stock at the date of

[1] State *v.* McCullough, 3 Nev. 202.

[2] See Part III. Table 14, page 584.

[3] Mumma *v.* Company, 8 Pet. U. S. 281; Taylor *v.* Holmes, 14 Fed. Rep. 498; Houston *v.* Jefferson College, 63 Pa. St. 428; Law *v.* Rich, 47 W. Va. 634; 35 S. E. 858.

[4] Sec. 79, chap. 194, of the Session Laws of 1903.

such consolidation. In case of disagreement as to the value thereof, such value shall be ascertained by three disinterested persons, to be chosen, one by the stockholder, one by the directors of the consolidated corporation, and the third by the two thus selected; and in case their award is not paid within thirty days from this date it shall become a debt of said consolidated corporation and may be collected as such. Upon receiving payment of the amount awarded, such stockholder shall transfer his stock to the consolidated corporation, which shall dispose of it on the best terms attainable.[1]

§ 47. **Incidental Powers, Definition and Enumeration of.** — An incidental power is one that is directly necessary or proper to the execution of an express power, and not one that has a slight or remote relation to it.[2] The term expresses those powers which flow necessarily out of the exercise of the express powers conferred by statute or by charter.[3]

The exercise of a power that might be beneficial to the principal business of the corporation is not necessarily incident to it.[4] The principal incidental powers may be enumerated as follows: (1) power to make contracts; (2) power to borrow money; (3) power to give and accept customary evidences of debt; (4) power to mortgage or pledge real and personal property; (5) power of amotion.

The implied powers which a corporation has in order to carry into effect those expressly granted, and to accomplish the purposes of its creation, are not limited to such as are indispensable for these purposes, but comprise all that are necessary in the sense of appropriate, convenient, and suitable, including the right of reasonable choice of means to be employed. Acts of a corporation which if standing alone or engaged in as a business would be beyond its implied powers, are not necessarily *ultra vires* when they are incidental to or form part of an entire transaction which in its general scope, is within the corporate purpose. The validity of such a transaction is to be determined from its general

[1] See Lanman *v.* Company, 30 Pa. St. 42; Mowrey *v.* Company, 17 Fed. Cas. No. 9891; 4 Bissell, 78; Pittsburg, etc. Ry. Co. *v.* Garrett, 50 O. St. 405; 34 N. E. 493.

[2] Hood *v.* Company, 42 Conn. 112; People *v.* Company, 130 Ill. 268; 22 N. E. 798; People *v.* Company, 175 Ill. 125; 51 N. E. 664.

[3] See U. M. Co. *v.* Bank, 2 Col. 248; Wright *v.* Hughes, 119 Ind. 324; 21 N. E. 907.

[4] Nicollet Nat. Bank *v.* Company, 71 Minn. 413; 74 N. W. 160.

character considered as a whole rather than by segregation into individual parts and each regarded as distinct from the other.[1]

§ 48. **Power to make Contracts.** — A corporation is a creature of law, and may do any act or thing under contract the same as natural persons might do, subject to the rights conferred on it by the law of its creation or by its charter.[2] Where chartered in one State for any purpose, it may lawfully make a contract in furtherance of that purpose in any other State where not prohibited by the laws thereof.[3]

§ 49. **Power to borrow Money.** — The power to borrow money in carrying out the purposes of the corporation's organization is one of the incidental corporate powers.[4] In this connection it may be said that the power to borrow money has been held to imply the power to issue bonds.[5] However that may be, in addition to an enumeration in the statute of the power to borrow money, a majority of the business corporation acts expressly confer the right upon corporations to issue bonds.[6]

§ 50. **Power to give and accept Customary Evidences of Debt.** — This incidental power includes the right of corporations to make notes or bills of exchange, to accept drafts and notes, and to draw checks.[7]

§ 51. **Power to mortgage and pledge Real and Personal Property** — Every corporation has the incidental power to mortgage and pledge its real and personal property in order to procure and secure necessary loans to be made to the corporation.[8] It is sometimes said that a corporation has power to pledge both its issued and unissued shares.[9]

§ 52. **Power of Amotion.** — The power of amotion has reference to the removal of officers and directors. The term "dis-

[1] C. O. N. G. F. Co. *v.* Company, 60 Ohio, 96; 53 N. E. 711; Porter *v.* Company (Mont.), 74 Pac. 938.

[2] Hand *v.* Company, 143 Pa. St. 408; 22 Atl. 709; People *v.* Company, 70 N. Y. 569; MacGinniss *v.* Company (Mont.), 75 Pac. 89.

[3] Hall *v.* Company, 91 Ala. 363; 8 Sou. 348.

[4] See Ward *v.* Johnson, 95 Ill. 215; Wright *v.* Hughes, 119 Ind. 324; 21 N. E. 907.

[5] Commonwealth *v.* Smith, 10 Allen (Mass.), 448; Smith *v.* Law, 21 N. Y. 296.

[6] See Part III. Table 14, p. 584.

[7] Moss *v.* Averell, 10 N. Y. 449; Lucas *v.* Pitney, 27 N. J. Law, 221; Smead *v.* Company, 11 Ind. 104; Strauss *v.* Company, 52 O. St. 59; Morris *v.* Cheney, 51 Ill. 451.

[8] State *v.* Company, 61 Kan. 547; 60 Pac. 337; Farmers' Bank *v.* Company, 108 Ky. 447; 56 S. W. 719; Savings Trust Co. *v.* Company, 112 Fed. 693.

[9] See U. Savings Ass'n *v.* Seligman, 92 Mo. 635; 15 S. W. 630; Burgess *v.* Seligman, 107 U. S. 20; 2 S. Ct. 10.

franchisement" has reference solely to the deprivation of the right to vote as against stockholders.[1] The right is delegated by statute to the stockholders in fifteen of the Commonwealths.[2] In the absence of such statute there is no power in the stockholders to remove directors before the expiration of their allotted terms, except for cause, provided such terms are fixed by statute.[3]

It seems to have been the rule of the common law that every corporation had an implied power to remove directors for cause when their terms of office were not prescribed by statute.[4] In New York it has been held that the power to remove directors may be covered by by-law.[5]

The main grounds which justify amotion where no statute exists limiting the same, are the conviction of crime on the part of directors, misconduct in office, and violation of statutory provisions.[6] If the charter or statute provides steps which must be taken to remove directors, such statute must be strictly followed.[7] In the exercise of this power the stockholders meet, charges must be preferred, and the director removed by a majority vote.[8] Equity will not interfere in such matters in the absence of usurpation or gross negligence.[9]

§ 53. **The Modern Doctrine of Ultra Vires.** — To define in a general way the ancient doctrine of *ultra vires* is to say that a contract of a corporation which is unauthorized by or in violation of its charter, or entirely outside of the scope of the express purposes of its creation or beyond the powers granted to it by the charter or by statute, is void in the sense of being no contract at all, because of a total want of power to enter into it; that such contract will not be enforced by any species of action in a court of justice; that being void *ab initio*, it cannot be made good by ratification or by any succession of renewals, and that no performance on either side can give validity to the unlawful contract, or form a foundation of any right of action upon it.[10]

[1] White *v.* Brownell, 4 Abb. Pr. N. S. 162.

[2] See Part III. Table 9, page 579.

[3] Nathan *v.* Tompkins, 82 Ala. 437; 2 So. 747.

[4] Fawcette *v.* Charles, 13 Wend. 473.

[5] Douglass *v.* Company, 118 N. Y. 484; 23 N. E. 806.

[6] Rex *v.* Richardson, 1 Burr. 517.

[7] State *v.* Trustees, etc., 5 Ind. 77.

[8] Rex *v.* Taylor, 3 Salk. 231; R. E. G. *v.* Smith, 10 Wood, 74; DeLacey *v.* Company, 1 Hawks (N. C.), 274; Purdy *v.* Ass'n (Mo. Ap.), 74 S. W. 486.

[9] Baker *v.* Backus, 32 Ill. 79; Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114; 19 Atl. 62; Id. 45 N. J. Eq. 241, 362; 3 Atl. 162.

[10] See Thompson on Corporations, vol. v. § 5968; for history of doctrine of *ultra*

The necessities of modern business and the arrival by the courts at a better conception of the true relations governing the matter, have brought about radical changes in the doctrine as here stated. What we propose to do in this connection is to set forth what may be termed "the modern doctrine of *ultra vires*." Preliminary to this a statement should be made showing how the doctrine of *ultra vires* originated, and how it came to be applied from time to time.

In the early days corporations were created mainly for public purposes, and it was in connection with quasi-public corporations that the doctrine of *ultra vires* first originated. In view of this fact, as has been well stated, there was no reason why the doctrine should ever have been applied to private corporations not formed for public purposes.[1]

The grounds of the old doctrine are stated by Judge Gray as follows:[2] "That the charter of a corporation which contains its grant of powers is a public statute, which all persons are bound to take notice of and be governed by; that the restraints thereby established on the alienation of the franchises of the property of the corporation are founded on considerations of public policy, which neither the corporation nor any other persons can be allowed to evade or disregard." In a later case, when sitting on the United States Supreme Court bench, the same judge observed:[3] "The reason a corporation is not liable on a contract *ultra vires* are the interests of the public that the corporation shall not transcend the powers granted; the interests of the stockholders that the capital stock shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; the obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers."

Turning now to this statement, attention should be called to those reasons which have aided a great majority of the courts in evolving a new doctrine of *ultra vires* better suited to the conditions of the present time. In the first place, except in the case of what is known as "quasi-public-private corporations," the

vires see B. G. L. Co. *v.* Claffy, 151 N. Y. 24; 45 N. E. 390.

[1] See Hennesey *v.* Muhleman, 40 N. Y. Ap. Div. 175; 57 N. Y. S. 854.

[2] Richardson *v.* Sibley, 11 Allen, 65.

[3] Pittsburgh, etc. Co. *v.* Keokuk, etc. Bridge Co., 131 U. S. 37; 9 S. Ct. 770.

public has no direct interest whatever in the nature of the powers vested in them. Corporations are no longer created by special act, except in a few cases, and it would be a poor rule which would require a stranger to take notice of the contents of charters not public and difficult to obtain. In modern times the placing in articles of incorporation of a large number of purposes, in some cases giving the corporation almost unlimited scope along business lines, has practically removed the objections spoken of above, to the effect that capital shall not be subjected to the risk of enterprises not contemplated by the charter.

Turning now to the changes already referred to, as having taken place in the doctrine of *ultra vires*, they may be stated in the form of the following propositions: (1) "The claim that a contract is void, because under the charter beyond the power of a corporation is seldom recognized as a defence to an agreement otherwise objectionable, and never where it would defeat the ends of justice or become a shield against wrong;"[1] (2) the doctrine of *ultra vires* is not usually applied where the party setting it up has received a benefit from the unlawful act relied upon as a defence;[2] (3) where the most that can be said of a corporate act is that it is an abuse of power, the State alone can act;[3] (4) the doctrine that persons dealing with corporations are bound to take notice of their power is now practically done away with by the application of the doctrine of estoppel in the case of completed contracts.

Again, it should be carefully noted that by the fullest application of the doctrine of estoppel where attempts have been made to set aside contracts on the ground that they were *ultra vires* of the corporate powers, the courts have practically revolutionized the doctrine as it once existed in this country. The doctrine of estoppel here referred to is of the character referred to by Lord Denman in Pickard *v.* Sears,[4] where he says that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. By an extended application of the

[1] Int. Trust Co. *v.* Company, 70 N. H. 118; 46 Atl. 1054; B. R. V. O. Co. *v.* Hanley, 15 Utah, 506; 50 Pa. St. 611.

[2] Norton *v.* Bank, 61 N. H. 589; Smith *v.* Bank, 72 N. H. 4.

[3] Rector *v.* Hartford Deposit Co., 190 Ill. 380; 60 N. E. 528.

[4] 6 Ad. & El. 469.

doctrine laid down by Lord Denman, the courts hold that where there has been no express violation of the law the corporation is estopped by its own contract or conduct from setting up, as a defence to an action to enforce such contract, that it was not in the power of the corporation to make it. So too the courts hold that where a private corporation enters into a contract in excess of its granted powers and has received the benefits of the contract which the other parties acted upon, the corporation is estopped to repudiate the contract on the ground that it was *ultra vires*. Repeatedly the courts have held that where a contract with a corporation — the making of which is beyond its chartered powers — has been fully executed by both parties to the contract, neither of them can assert its invalidity as a cause of action as against the other.

Again, it may be stated that where a corporation has acted in excess of its granted powers or in the face of express or implied statutory prohibition it is clear that there can be no objection raised on that ground between it and a private party, for this can only be raised by the State in a direct proceeding to forfeit the franchises of the corporation.[1] Again, it may be stated that the doctrine of estoppel, as well as the doctrines of ratification and confirmation by acquiescence, apply under modern rules to *ultra vires* contracts.[2]

An Ohio court has divided unauthorized acts of a corporation into two classes: (1) where it has no power to do what it promises or to receive what is promised; (2) where it has no power to do what it promises but may receive what is promised. In each class, it was said, if action is brought, one of three states of fact will appear: (*a*) where it has performed its promise, but the other party has not; (*b*) where the other party has performed, but it has not; (*c*) where neither party has done all that was promised. In case 1 *a* the corporation cannot recover; the contract has no existence. In case 2 *a* the corporation may recover for performance if it has eliminated the *ultra vires* element and there is no want of mutuality. In cases 1 *b* and 2 *b* what remains to be done is *ultra vires*, and neither party can recover. In cases 1 *c* and

[1] Union Nat. Bank *v.* Matthews, 98 U. S. 621; Pullman *v.* Upton, 96 U. S. 328.

[2] See Water Works Co. *v.* Low, 46 N. Y. Sup. 633; Woodruff *v.* Erie R. R. Co., 93 N. Y. 609; Miller *v.* Am. Mut. Acci. Ins. Co., 92 Tenn. 167; Wood *v.* Corry Water Works Co., 44 Fed. 146; Linkauf *v.* Lombard, 137 N. Y. 417; 33 N. E. 472; Nims *v.* School, 160 Mass. 177; 35 N. E. 776; J. B. Farrell Company *v.* Wolf, 96 Wis. 10; 70 N. W. 289; Smith *v.* Bank of New England, 72 N. H. 4.

2 *c* neither party can recover because the contract is *ultra vires*. Recovery cannot be helped by promises of the officers. Pure assertion of law cannot give rise to estoppel. Nor is recovery aided by the fact that a consideration was conveyed to an individual as trustee for the corporation.[1]

§ 54. **Corporate Domicile.** — Corporations, like individuals, must have a place of abode.[2] As far back as Lord Coke's time a place of abode was held to be of the essence of a corporation.[3] Unless provided otherwise by statute, the rule at the present time is that corporations to have any legal existence must have a home within the boundaries of the State which creates it.

In the words of Justice McAdam in Kruse *v.* Dusenbury,[4] "A corporation cannot become a tramp. It must have a domicile — not in theory, but in fact — within the sovereignty which created it. . . . A corporation in the nature of things must have some office or place of business in the State where it was incorporated, so that creditors may know where to find it, that they may present and if necessary prosecute their just demands. The statute contemplates that such place of business shall exist not only in name, but in fact; for, if the corporation has no place of business in the state where it was incorporated, it does not affect the charter, but it cannot have branch offices elsewhere. Like a live tree, it cannot consist of branches only, but must take root in its native soil before it can extend its branches into other States."

Most of the States have statutes expressly requiring the maintenance of a domiciliary office within the State of the corporation's origin, and failure to comply with this requirement renders the charter of such corporation liable to forfeiture upon proper action taken by the State.[5]

Thus in Minnesota a charter was forfeited for the failure on the part of the corporation to maintain a domiciliary office therein. In this case,[6] the court observed, "that independently of statute, it is incumbent upon a private corporation to keep its principal place of business, its books and records, and its principal offices in

[1] Vos *v.* Association, 9 Bull. (Ohio) 194.

[2] *In re* Spring Valley Water Co., 17 Cal. 132.

[3] See Sutton's Hospital Cases, 5 Coke's Rep. 253.

[4] 19 Wk. Di. (N. Y.) 201.

[5] See N. & S. R. Co. *v.* People, 147 Ill. 234; 35 N. E. 608; State *v.* Company, 24 Tex. 80; State *v.* Company, 45 Wis. 579; Simmons *v.* Company, 113 N. C. 147; 18 S. E. 117; State *v.* Company, 58 Minn. 330; 59 N. W. 1048; State *v.* Company, 59 Kan. 151; 52 Pac. 422.

[6] State *v.* P. & N. L. Co., 58 Minn. 330; 59 N. W. 1048.

the State where it is incorporated, to an extent necessary to the fullest jurisdiction and visitorial power of the State and its courts and the efficient exercise thereof in all proper cases, and that a forfeiture may be adjudged for a violation of this common law obligation."[1]

The authorities have on more than one occasion brought actions to forfeit charters of corporations for failure to maintain domiciliary offices therein.[2]

In the words of one court, a corporation "must have some fixed office or place of business in the State where it is incorporated, so that creditors may know where to find it."[3] Again, the object of naming the domicile is to fix the place for the holding of stockholders' and directors' meetings, and to fix a location for the books of the corporation where the stockholders and creditors may demand an inspection thereof, if this right is given to them by statute.[4] Another purpose is to fix the venue of actions brought against a corporation where the law requires that suits shall be brought in the county where the defendant resides. In those States which have statutes expressly authorizing a corporation to transact all of its business outside of the domiciliary State, this provision for a domiciliary office is of the utmost importance.

A corporation cannot have two domiciles at the same time.[5] The domicile, residence, and citizenship of a corporation are in the State from which the charter was procured.[6] The place of residence is in the county where the principal office is located.[7]

The principal office of a corporation and the place for the transaction of its business are not one and the same thing. A corporation may have its office in one locality and transact its business in another.[8]

[1] See also State *ex rel. v.* Company, 45 Wis. 579; Stickle *v.* Liberty Cycle Co. (N. J.), 32 Atl. 708.

[2] See N. & S. R. Co. *v.* People, 147 Ill. 234; 35 N. E. 608; State *v.* Company, 24 Texas, 80; State *v.* Company, 45 Wis. 579; Simmons *v.* Company, 113 N. C. 147; 18 S. E. 117; 22 L. R. A. 677; State *v.* Company, 58 Minn. 330; 59 N. W. 1048; State *v.* Company, 59 Kan. 151; 52 Pac. 422; Montgomery *v.* Forbes, 148 Mass. 249; 19 N. E. 342.

[3] Kruse *v.* Dusenbury, 19 Wk. Dig. (N. Y.) 201.

[4] State *v.* Ry. Co., 45 Wis. 580.

[5] Bridge Co. *v.* Woolley, 78 Ky. 525.

[6] American, etc. Co. *v.* Johnston, 60 Fed. 503; Chafee *v.* Bank, 71 Me. 514.

[7] McSherry *v.* Company, 97 Cal. 637; 32 Pac. 711.

[8] Van Etten *v.* Eaton, 19 Mich. 187; Kennett *v.* Company, 68 N. H. 432; 39 Atl. 585; Meredith *v.* Company, 59 N. J. Eq. 257; 44 Atl. 55; Harris *v.* McGregor, 29 Cal. 124.

§ 55. **Board of Management.** — A corporation without a responsible management is like a boat without oars, a ship without sails. It must have certain recognized and duly appointed agents to represent the stockholders in the management of the company. These agents are generally known as a board of directors, or less commonly as a board of trustees. Twenty of the States require the names of the first board of directors to be inserted in the certificate of incorporation, while of the remainder nine require merely the number of directors to be stated therein. Twenty-two of the States prescribe residential requirements for directors, while others require that all directors shall be stockholders. The number of directors required by the various business corporation acts vary from an unlimited maximum to a minimum of one.[1]

Where the statute requires the number of directors to be set forth in the articles, the incorporators cannot name a number less than the minimum required by law.[2] The power to have and elect directors is inherent in every corporation, irrespective of statute. In fact, it is an essential feature of corporate existence.[3]

In the absence of express provision in the charter or by-laws the management of the business of the corporation is vested in the Board of Directors and not in the stockholders.[4] Failure to name directors in the articles when the same is required by statute will justify State officials in refusing to file articles.[5] Merely providing for executive officers in the articles is insufficient.[6] The original directors named in the certificate of incorporation under direction of the incorporation act are directors *de jure*, clothed with all the powers of the corporation, and may exercise the same powers as though elected by the stockholders.[7]

§ 56. **Capital Stock.** — Capital stock is the fund of money or other property fixed as the basis for conducting the business of the corporation, and contributed by the corporators to the capi-

[1] See Part III. Table 14, page 584.

[2] *In re* Germania Sangerbund, 12 Penn. Co. Ct. Rep. 89.

[3] Terwilliger *v.* Company, 59 Ill. 249; Reed *v.* Company, 50 Ind. 342; Hurlbut *v.* Marshall, 62 Wis. 590; 22 N. W. 852.

[4] Dana *v.* Bank, 5 W. & S. (Pa.) 247.

[5] Eakwright *v.* Company, 13 Ind. 404; *In re* Association, 19 Penn. Co. Ct. Rep. 25; People *v.* Selfredge, 52 Cal. 331.

[6] Bates *v.* Wilson, 14 Col. 140; 24 Pac. 99.

[7] Hamilton Trust Co. *v.* Clemens, 163 N. Y. 423; 57 N. E. 614.

tal, and is usually represented by shares issued to subscribers to the stock on the initiation of the enterprise.[1] Capital stock from another aspect is the security for creditors of the corporations, and entitles the owners thereof to participate in the management of corporate business and share in its profits and in its surplus after payment of corporate debts.[2] Shares of stock, on the other hand, are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member.[3] Frequently the words "capital" and "capital stock" are used interchangeably to express the property and assets of the corporation.

It is not altogether clear whether express authority to issue shares of capital stock is necessary, yet it has been repeatedly held that in order to increase or reduce the capital stock of a corporation, legislative authority is necessary. The prevailing view seems to be in favor of the necessity of legislative authority.[4]

In the absence of statutory or charter requirements neither subscription for capital stock nor payment thereof is necessary to corporate existence.[5] If the charter of a corporation does not fix the amount of its capital stock, it must be fixed by the stockholders, or, with their consent, by the directors.[6] Stock can be issued only by direction of the corporation.[7]

In many of the Commonwealths the minimum amount of capital stock which a corporation may have is fixed by statute. Very few of the States limit the maximum amount of capitalization.[8] To determine the amount of capital stock that a corporation has, preferred stock must always be included therein.[9] It is not always an easy question to determine who are and who

[1] Christensen *v.* Eno, 106 N. Y. 97; 12 N. E. 648.

[2] Janney *v.* Bank, 98 Ala. 515; 13 So. 761.

[3] Mechanics' Bank *v.* Company, 13 N. Y. 599.

[4] Cooke *v.* Marshall, 191 Pa. St. 315; 43 Atl. 314; 196 Pa. St. 200; 46 Atl. 447; Detroit Chamber of Commerce *v.* Gardner, 109 Mich. 691; 67 N. W. 897.

[5] McGinty *v.* Company, 155 Mass. 183; 29 N. E. 510; Jefferson Nat. Bank *v.* Company, 74 Texas, 421; 2 S. W. 101; Stowe *v.* Flagg, 72 Ill. 397.

[6] So. K. Ry. Co. *v.* Cushing, 45 Me. 524; State *v.* Bank, 95 Tenn. 221; 31 S. W. 993.

[7] H. D. P. Ass'n *v.* Stevens, 34 Neb. 528; 52 N. W. 568; Hendrix *v.* Academy of Music, 73 Ga. 437; State *v.* Company, 41 Ind. 151; Williams *v.* Hewitt, 47 La. Ann. 1076; 17 So. 496.

[8] See Part III. Table 5, page 575. See also Hughes *v.* Company, 34 Md. 316.

[9] State *v.* Company, 16 S. C. 524.

are not stockholders. The question must usually be determined by the particular facts of each case.[1]

Sometimes the incorporation act requires the articles to state the time when and the manner in which stock shall be paid for. It is sufficient in this connection to say, for example, that the stock shall be paid for in cash, and that no certificate of stock shall issue until such payment is made.[2] The statement may be broadened if desired by setting forth in the articles that the stock shall be paid for in property, at such times and of such a character and with such notice to the subscribers as the directors shall deem for the best interests of the corporation.[3]

Where the statute requires the amount of the capital stock to be stated, it has been held sufficient to simply state the number of shares and the par value of the same.[4]

§ 57. **Limitations upon Amount of Capital Stock.** — As has already been observed, the great majority of the incorporation acts provide that the amount of capital stock which the corporation is to have shall be fixed in the articles of incorporation. This is the usual and often the only limitation on the amount of capital stock which any particular corporation is authorized to have. However, in fourteen of the Commonwealths the minimum capital stock of all corporations is fixed by statute, while in three of them the maximum capitalization is also prescribed.[5]

In this connection the words of the court in Barry *v.* Merchants Exchange Co.[6] are peculiarly instructive. In that case Chancellor Sanford observed: "That the capital stock of a corporation is the aggregate amount of the funds of the corporators which are combined together under a charter, for the attainment of some common object of public convenience or private utility. This amount is fixed in the act of incorporation. It is thus limited, in reference to the convenience of the intended corporators, and for the information and security of the public at large. To the corporators it prescribes the amount and the subdivisions of their respective contributions to the com-

[1] See O'Brien *v.* Fulkerson, 75 Mich. 554; 42 N. W. 979.

[2] N. O. Ry. Co. *v.* Frank, 39 La. Ann. 707; 2 So. 310.

[3] See Baltimore, etc. Telephone Co. *v.* Company, 37 La. Ann. 883.

[4] Buffalo, etc. Ry. Co. *v.* Hatch, 20 N. Y. 157.

[5] See Part III. Table 5, page 575.

[6] 1 San. Chan. (N. Y.) 280.

mon fund; the voice which each shall have in the control and management; and the apportionment of the profits of the enterprise. To the community it announces the extent of the means contributed and forming the basis of the dealings of the corporate body, and enables every man to judge of its ability to meet its engagements and perform what it undertakes. And when the statute requires the stock to be paid in before the corporation can transact business, security to those contracting with it is thereby superadded to the information of its resources. These objects for the public benefit are such as the legislature had in view in limiting the amount of capital stock, and requiring a specified sum or proportion to be paid in. One other consideration dictates the amount thus fixed. This is the probable and reasonable extent of the means requisite to the accomplishment of the end proposed, qualified in many cases by the unwillingness of the legislature to create these artificial beings with an undue amount of capital."

§ 58. **Par Value of Capital Stock.** — In thirty-six of the States the par value of the shares of the capital stock may be any amount. In the remainder the par value is limited by statute.[1] Where the corporation act does not require that the number and par value of shares be set forth, the presumption is that the legislature intended that this should be fixed by the stockholders of the corporation at the organization meeting.[2] The matter may be entrusted by the stockholders to the directors if desired.[3]

The question sometimes arises as to whether changing the par value of shares without increasing or decreasing the capital stock constitutes such a "variation" therein as to come within the statutory prohibition forbidding such variation without legislative authority. The prevailing rule seems to be that such variation may be made only by conforming to the statute (if any exists) authorizing amendments to the charter in this regard.[4]

§ 59. **Amount of Stock Subscriptions.** — Unless made so by statute, no subscription, in whole or in part, of the capital stock of a corporation is necessary, either to the validity of a corporation's existence or to its right to transact business.[1] The rule, however, that exists in this country to-day is doubtless opposed to the common law rule on the subject.[2] The States of Washington, Illinois, and Missouri require subscriptions to the full amount of the authorized capital stock.[3]

[1] See Part III. Table 6, page 576.
[2] S. & K. R. Co. *v.* Cushing, 45 Me. 524; State *v.* Bank, 95 Tenn. 221; 31 S. W. 993.
[3] Commonwealth *v.* Company, 52 Pa. St. 506.
[4] C. C. Ry. Co. *v.* Allerton, 18 Wall. 233; Seignouret *v.* Company, 24 Fed. 332.

Fourteen of the Commonwealths require the amount of stock subscribed for by each incorporator to be set forth in the articles, while others require the amount of stock with which the corporation will commence business to be stated. A few prescribe that the amount of stock actually subscribed shall be set forth.[4] Sometimes provisions are found requiring the residences of subscribers to the capital stock to appear in the articles.[5]

Any person capable of contracting may subscribe for stock or become a stockholder. This includes aliens, married women, and corporations.[6] Subscriptions for stock must be made through commissioners where the law so provides.[7] But even where such subscriptions are made through parties other than commissioners contrary to the statute, such subscriptions may be afterwards ratified by the proper party.[8]

Occasionally attempts are made to limit by charter provisions the amount of stock which may be owned by any one stockholder. Such provisions are generally held void, as not called for by the governing statute.[9] An important question that arises in connection with the general subject of stock subscriptions, amount of stock paid in, and amount of capital with which the corporation may begin business, has reference to the effects which follow a failure on the part of the corporation to comply with such statutory requirements. In general, it may be said that the penalties which follow a failure to comply with such provisions are generally along the following lines:

First, they afford a basis for an action to be brought by the State

[1] Livesey *v.* Company, 5 Neb. 50; Johnson *v.* Kessler, 76 Ia. 411; 41 N. W. 57; S. F. N. Bank *v.* Almy, 117 Mass. 476; Minor *v.* Bank, 1 Peters (U. S.), 46; 7 L. E. 47; Schenectady, etc. Plank Road Co. *v.* Thatcher, 111 N. Y. 102.
[2] Schloss *v.* Company, 87 Ala. 411; 6 So. 360.
[3] Denny Hotel Co. *v.* Schram, 6 Wash. 134; 32 Pac. 1002.
[4] See Buffalo, etc. Ry. Co. *v.* Hatch, 20 N. Y. 157; People *v.* Chambers, 42 Cal. 201; L. O. A. Ry. Co. *v.* Mason, 16 N. Y. 451.
[5] See Steinmetz *v.* Company, 57 Ind. 457.
[6] Dublin, etc. Ry. Co. *v.* Black, L. R. 8 Exch. 181; Cork, etc. Ry. Co. *v.* Cazenove, L. R. 10 Ad. & El. 935.
[7] Shurtz *v.* Company, 9 Mich. 269.
[8] Walker *v.* Company, 34 Misc. (N. Y.) 245.
[9] O'Brien *v.* Cummings, 13 Mo. Ap. 197.

looking to the forfeiture of the charter. Secondly, they sometimes result in rendering the incorporators liable as co-partners, the courts holding that by failing to comply with the statute they have forfeited their right to immunity from individual liability for what would otherwise be distinctively corporate debts. Thirdly, in some jurisdictions a penalty is prescribed by statute making directors and officers liable for all debts contracted before the statutory requirements above referred to have been complied with.

It goes without saying that corporations cannot legally issue stock in excess of their authorized capitalization.[1] However, this does not mean that *bona fide* purchasers of such shares are without remedy, for ordinarily in such cases both the corporation and its officers are liable.[2]

§ 60. **Amount of Stock paid in.** — It has already been observed that neither the subscription to nor the payment of the whole amount of capital stock authorized by the charter is a condition precedent to the legal existence of the corporation unless it is made so by a governing statute. Ordinarily, it merely goes to the right to transact business, without subjecting the directors or the corporate officers and agents to personal liability.[3] However, in some few of the States the corporation acts provide that before the corporation may commence business a certain percentage of the capital stock shall be paid in.[4] Where the articles fail to so set forth the amount of stock paid in as required by statutes, this does not affect *ipso facto* the legality of the corporation's existence, but it is a matter which can only be taken advantage of by the State in *quo warranto* proceedings.[5]

Statutory payments must be made in the manner and time provided by statute, and they must be paid in in good faith.[6]

[1] Mechanics' Bank *v.* Company, 13 N. Y. 599; Scovill *v.* Thayer, 105 U. S. 143.

[2] N. Y. N. H. R. Co. *v.* Schuyler, 34 N. Y. 30; Moores *v.* Bank, 111 U. S. 156; 4 S. Ct. 345.

[3] D. S., etc. Co. *v.* Attorney-General, 21 Can. Sup. Ct. 72; S. P. R. Co. *v.* Thatcher, 11 N. Y. 102.

[4] See Part III. Table 6, page 576.

[5] E. P. R. Co. *v.* Vaughan, 14 N. Y. 546. See also Hendrix *v.* Academy of Music, 73 Ga. 437; K. C. H. Co. *v.* Hunt, 57 Mo. 126; Tradesmen Publishing Co. *v.* Company, 95 Tenn. 634; 32 S. W. 1097; Ag. Bank *v.* Burr, 24 Me. 256; Y. R. L. N. Co. *v.* Company, 72 Fed. 62.

[6] McLaren *v.* Pennington, 1 Paige (N. Y.), 102; People *v.* Chambers, 42 Cal. 201; State *v.* Company, 3 Hump. (Tenn.) 305; People *v.* City Bank, 7 Col. 226; 3 Pac. 214; People *v.* Bank, 129 Ill. 618; 22 N. E. 288; Hammond *v.* Strauss, 53 Md. 1.

Failure to state, in the affidavit relative to the amount of stock paid in, that such payments had been made in good faith to the directors is not fatal, as the *bona fides* of the transaction will be implied.[1]

§ 61. **Amount of Stock with which a Corporation may begin Business.** — Some few of the States require that the amount of capital with which a corporation will begin business shall be set forth in the articles. In some cases, as in New Jersey and New York, the minimum amount is prescribed by statute. The failure, however, to actually pay in the prescribed amount of capital stated in the articles will not operate to destroy the corporate existence.[2]

§ 62. **Duration of Corporate Existence.** — At one time there was a tendency on the part of the States to limit the duration of corporate existence of corporations to a definite period in the supposed interest of the public.[3] At the present time in twenty-six of the Commonwealths perpetual charters may be procured under the business corporation acts in force therein. In the remaining States the periods vary from one hundred years to twenty.[4] Even in these States provision is made for extension of corporate existence by complying with the statute in such case made and provided.[5]

The phrase "perpetual succession" has been held not to be equivalent to perpetual existence.[6] The naming of a period of corporate existence in the charter in excess of that permitted by law will not render the charter void, but the corporate existence will not be continued beyond the statutory period.[7]

It is scarcely necessary to say that the continuance of active corporate existence during the entire period limited by the charter is not binding upon the corporation.[8] A difficult question often arises when the corporation attempts to continue its active business as a corporation and to perform its corporate

[1] Buffalo, etc. Ry. Co. *v.* Hatch, 20 N. Y. 157.

[2] Staunton Copper Mining Co. *v.* Thurmond, 7 Mo. Ap. 587; Hammond *v.* Strauss, 53 Md. 1; State *v.* Webb, 97 Ala. 111; 12 So. 377.

[3] Smith *v.* Company, 58 N. J. Eq. 331; 43 Atl. 567; State *ex rel.* Walker *v.* Payne, 129 Mo. 468; 31 S. W. 797.

[4] See Part III. Table 13, page 583.

[5] See *post*, sec. 120.

[6] Fairchild *v.* Association, 71 Mo. 526; State *ex rel.* Walker *v.* Payne, 129 Mo. 468; 31 S. W. 797.

[7] People *v.* Cheeseman, 7 Col. 376; 3 Pac. 716; Hughes *v.* Company, 34 Md. 316. See also Buffalo, etc. Ry. Co. *v.* Hatch, 20 N. Y. 157.

[8] Cronin *v.* Company *et al.*, 29 Wk. L Bul. (Ohio) 52.

functions after the expiration of its charter. Ordinarily this is a matter which concerns the State alone.[1] Under such circumstances, in order to protect third parties, the courts recognize such corporations as corporations *de facto* on the ground that there is clearly authority for their attempting to act as corporations.[2] Many courts of high authority have held that a corporation is dissolved and ceases to exist when its charter expires.[3] In many States there are statutes permitting corporations to exist as such for certain purposes after the expiration of their charter.[4] The purpose of such statutes is to grant to the corporation time to close up its corporate affairs. It has been held that the object of such statutes is not to limit but to enlarge corporate privileges so that the corporation may continue active business throughout the whole charter period.[5]

§ 63. **Date of Annual Meeting.** — In Alaska, Arizona, Delaware, Iowa, Minnesota, Nebraska, and Utah the corporation acts require that the date of the annual meeting of the corporation be inserted in the articles. Such provisions are to be regarded as directory rather than mandatory, and their legal effect is essentially the same as if such provision was merely made in a valid by-law of the corporation. In Arkansas, Louisiana, and Tennessee the date of the organization meeting must appear in the certificate of incorporation.[6] Even when the statute requires that the directors shall be chosen at the annual meeting, this has no reference to the election of the first board at the organization meeting.[7]

§ 64. **Limitation upon Corporate Indebtedness.** — In the absence of constitutional or statutory provision, there are no limitations imposed upon corporations with respect to the amount of indebtedness which they may incur.[8] The whole extent of corporate credit is measured and controlled by its capital. The laws of trade have placed more efficient barriers than the State

[1] Bushnell *v.* Company, 138 Ill. 67; 27 N. E. 596.

[2] Miller *v.* Company, 31 W. Va. 836; 8 S. E. 600.

[3] Bradley *v.* Reppell, 133 Mo. 545; 32 S. W. 645; Sturges *v.* Vanderbilt, 73 N. Y. 384.

[4] See Part III. Table 17, page 587.

[5] Berwick *v.* Company, 39 Mich. 701.

[6] Hughes *v.* Parker, 20 N. H. 58; Beardsley *v.* Johnson, 121 N. Y. 224; 24 N. E. 380.

[7] B. A. M. Co. *v.* Moring, 15 Gray (Mass), 211.

[8] Barry *v.* Company, 1 San. Chan. (N. Y.) 280, 310.

legislatures to the power of corporate borrowing. In Alaska, Arizona, Florida, Iowa, Minnesota, and Nebraska, the incorporation acts require that the maximum amount of indebtedness which the corporation may incur shall be set forth in the articles of incorporation.

In twenty-two of the Commonwealths statutes, either expressly or by implication, prescribe the amount of indebtedness which corporations may incur.[1]

When the phrase "implied limitation upon corporate indebtedness" is used, reference is had to that not uncommon form of limitation where directors or stockholders are made liable for corporate debts in case the corporate indebtedness exceeds a certain definite amount.[2]

§ 65. **Exemption of Stockholders from Personal Liability.** — While there is no common-law liability imposed upon stockholders for corporate debts, nevertheless parties may lawfully contract to any extent they see fit as to their own personal liability for such indebtedness.[3]

In order that stockholders may avoid personal liability for corporate debts it is necessary in Arizona, Delaware, Iowa, Kentucky, Louisiana, Mississippi, Nebraska, and Utah, to insert provisions in the certificates of incorporation expressly exempting stockholders from such liability.

§ 66. **Adoption of By-Laws by Directors.** — In a large number of the States and Territories the incorporation acts expressly provide for delegation of power to directors to make, alter, or repeal by-laws.[4] In many of the States in order that the corporation may have this power it is necessary to insert provision therefor in the charter.[5] Unless the power to make, alter, or repeal by-laws is thus delegated to the board of directors, it can only be exercised by the stockholders.[6]

[1] See Part III, Table 12, page 582. See also Commonwealth *v.* Company, 129 Pa. St. 405; 18 Atl. 414; O. H. Mfg. Co. *v.* Canney, 54 N. H. 295; Thornton *v.* Balcom, 85 Ia. 198; 52 N. W. 190; Heuer *v.* Carmichael, 82 Ia. 288; 47 N. W. 1034.

[2] See Tallmadge *v.* Company, 4 Barb. (N. Y.) 382; Allison *v.* Company, 87 Tenn. 60; 9 S. W. 226; Sweney *v.* Talcott, 85 Ia. 103; 52 N. W. 106; Gunther *v.* Company, 107 Ky. 44; 52 S. W. 931.

[3] London, etc. Bank *v.* Parrott, 125 Cal. 472; 58 Pac. 164; Lillard *v.* Company, 14 Tex. Civ. Ap. 67; 36 S. W. 792; Tidioute Sav. Bank *v.* Libbey, 101 Wis. 193; 77 N. W. 182.

[4] See Part III., Table 12, page 582.

[5] Cahill *v.* Company, 2 Doug. (Mich.) 128; Heintzelman *v.* Association, 38 Minn. 138; 36 N. W. 100; Bank of Holly Springs *v.* Pinson, 58 Miss. 421.

[6] Morton Gravel Road *v.* Wysong, 51

§ 67. **Provisions for the Regulation of the Internal Affairs of the Corporation.** — In a number of the States statutory authority is to be found for inserting in the articles of incorporation any provisions that may be desired relative to the regulation of the business, and for the conduct of the affairs of the corporation, creating, defining, and limiting the powers of the corporation, the officers, and the stockholders.[1] Under such authority the clauses which are usually inserted are the following: giving the directors power to sell all the business of the corporation as an entirety; the power to sell entire corporate property at the request of a majority of the stockholders; giving the right to directors to make and alter by-laws; giving the power to directors to borrow money upon bond and mortgage without authority therefor being first given by the stockholders; power to appoint additional vice-presidents and assistant secretaries and treasurers; to declare dividends; to reserve and fix working capital; to appoint an executive committee from the board of directors; giving stockholders power to remove directors; giving power to create a lien upon stock for indebtedness due company from stockholders; provision for the examination of books by the stockholders, and in connection therewith power to insert private publicity clause; to provide for cumulative voting and limiting the power to vote; reservation of power to change provisions in the articles of incorporation; power to create preferred stock.

§ 68. **Miscellaneous Provisions Relative to Contents of Articles of Incorporation.** — It would be impossible to enumerate all the peculiar provisions under the several business corporation acts which exist in the various States. Among those not already referred to are the following: Statement of the amount of stock subscribed for by the incorporators; a list of all parties who have subscribed for stock as preliminary to incorporation.[2]

In setting forth the subscribers to the capital stock it is sufficient to use above the first name the words "names,"

Ind. 4; N. M. T. S. Co. *v.* Bishop, 103 Wis. 492; 79 N. W. 785; *In re* A. A. Griffing Iron Co., 63 N. J. Law, 168, 357; 41 Atl. 931; 46 Atl. 1097.

[1] See Part III. Table 10, page 580.

[2] Chester Glass Co. *v.* Dewey, 16 Mass. 94; C. V. & P. Co. *v.* Secretary of State, 128 Mich. 62; 87 N. W. 901; J. N. Bank *v.* Company, 74 Tex. 421; 12 S. W. 110.

"residences," "shares," and then immediately follow the same with the names of the subscribers to the capital stock.[1] Among other provisions are those requiring the naming of an agent upon whom service of process upon the corporation may be served;[2] another, a statement of the manner of conducting the business of the corporation.[3] A number of the States require the names and residences of the incorporators to be set forth in the articles.[4] Sometimes it is necessary to secure the approval of the Attorney-General to the form and contents of the articles.[5]

§ 69. **Construction of Charter.** — Under the liberal provisions of the modern incorporation acts, the articles drawn thereunder necessarily assume, by the sole action of the incorporators, numerous powers, many of which have been heretofore of a public character, affecting the interests of the public very largely and very seriously. The Supreme Court of the United States has taken the view that, for the reasons just given, these articles do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. That court has said in this connection, that where the question is whether they conform to the authority given by statute in regard to corporate organization, it is always to be determined upon a just construction of the power granted to them with a due regard for all other laws of the State upon that subject.[6]

In construing charters the following rules seem to govern the courts: First, the intention of the legislature must be given due weight.[7] Second, due consideration must be given to the policy of the State with reference to such matters as evidenced by the character of legislation. Third, all ambiguities in the terms of the articles of incorporation must be construed against the corporation in favor of the public.[8] Fourth, words should be given their ordinary meaning.[9] Fifth, the construction given

[1] Vawter *v.* Franklin College, 53 Ind. 88.

[2] Johnson *v.* Masons' Lodge, 21 Ky. L. R. 493; 51 S. W. 620.

[3] State *v.* Association, 29 O. St. 399.

[4] Steinmetz *v.* Company, 57 Ind. 457; State *v.* Foulkes, 94 Ind. 493.

[5] See Field *v.* Cooks, 16 La. Ann. 153.

[6] Or. Ry. Co. *v.* Or. Ry. Co., 130 U. S. 1; 9 S. Ct. 409.

[7] Union Nat. Bank *v.* Matthews, 98 U. S. 621.

[8] A. L. & T. Co. *v.* Company, 157 Ill. 641; 42 N. E. 153.

[9] Riker *v.* Leo, 133 N. Y. 519; 30 N. E. 598.

the charter must always be reasonable.[1] Sixth, where the language of the certificate as to corporate purposes and powers permits of two constructions, that the more favorable to the State is to be adopted.[2]

[1] Black *v.* Company, 22 N. J. Eq. 130; Wheeler, etc. Co. *v.* Company, 14 Wash. 630; 45 Pac. 316; Nat. Bank *v.* Company, 41 O. St. 1.

[2] Bridge Co. *v.* Ferry Co., 29 Conn. 221.

CHAPTER II.

PROCURING THE CHARTER.

§ 70. **Signing the Articles.** — With but few exceptions the business corporation acts of the various Commonwealths provide that the articles shall be signed by the incorporators.[1] It is not requisite to the validity of such articles that they be signed within the State from which the charter is procured.[2] The articles may be drawn on separate sheets, the last one of which only need be signed by the incorporators.[3] If the incorporator is unable to write he may sign the articles by his mark.[4] The full name need not be signed.[5]

If seals are required by statute they must be used.[6] The use of a power of attorney to sign articles would probably not be sanctioned where the statute calls for additional matters which are necessarily personal in their nature.[7]

§ 71. **Acknowledgment of Execution of Articles.** — With some few exceptions, the incorporation acts of all the States require that the articles of incorporation shall be acknowledged by the incorporators, before some officer authorized by law to take acknowledgments of deeds. There must in all cases be a proper number of acknowledgments.[8] Where the statutes designate some particular officer to take the acknowledgment, the charter is voidable if taken before any other official.[9] A failure, on the part of the officer taking the acknowledgment, to certify that the

[1] State *v.* Critchett, 37 Minn. 13; 32 N. W. 787; People *v.* Company, 97 Cal. 276; 32 Pac. 236; Hughes *v.* Company, 34 Md. 316; W. B. & L. Ass'n *v.* Coleman, 89 Pa. St. 428.

[2] Humphreys *v.* Mooney, 5 Col. 282.

[3] See L. O. A. & N. Ry. Co. *v.* Mason, 16 N. Y. 451.

[4] Trustee, etc. *v.* Campbell, 46 La. Ann. 1543; 21 So. 184.

[5] State *v.* Beck, 81 Ind. 500.

[6] Griffen *v.* Company, Fed. Cases, No. 5816; Warner *v.* Callender, 20 O. St. 190.

[7] *In re* Charter Acknowledgment, 28 Pa. Co. Ct. Rep. 187.

[8] People *v.* Company, 97 Cal. 276; 32 Pac. 236; Hughes *v.* Company, 34 Md. 316; Doyle *v.* Mizner, 42 Mich. 332; 3 N. W. 968; Kaiser *v.* Bank, 56 Ia. 104; 8 N. W. 772; State *v.* Critchett, 37 Minn. 13; 32 N. W. 787.

[9] Shields *v.* Company, 94 Tenn. 123, 28 S. W. 668; State *v.* Lee, 21 O. St. 662; Simmings *v.* Association, 26 O. St. 483.

incorporators were personally known to him will not invalidate the incorporation proceedings.[1]

Even where the statutes require the organization meetings to be held within the domiciliary State, it is not necessary that the articles be signed and acknowledged therein.[2]

The omission of immaterial parts of the acknowledgment does not operate to render the incorporators liable as partners.[3] In order to entitle articles to be filed with the proper State official, they must be signed and acknowledged in all respects as required by law.[4]

§ 72. **Publication of Articles.** — In ten of the Commonwealths the law requires that either the petition for a charter or the charter itself or the substance thereof shall be published for a prescribed length of time.[5] The original theory upon which such requirements are based appears to have been that the creation of a corporation should be attended with all possible publicity, in order that all the world might acquaint itself with the fact that it is dealing with a corporation and not with a natural person.[6] At the present time the legislatures seem to proceed on the basis of furnishing the newspapers with additional paid matter on the theory that they need it in their business. However that may be, it still remains true that the statutes governing publication of articles must be substantially complied with, otherwise the charter may be declared void at the instance of the State.[7]

Sometimes due publication of articles carries with it immunity from personal liability.[8]

It has been held that the publication of more than the law requires will not invalidate the legality of the publication.[9]

[1] People *v.* Cheeseman, 7 Col. 376; 3 Pac. 716. See also Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.), 211.

[2] Humphreys *v.* Mooney, 5 Col. 282.

[3] Stout *v.* Zulick, 48 N. J. L. 599; 7 Atl. 362.

[4] Doyle *v.* Mizner, 42 Mich. 332; 3 N. W. 968; Montgomery *v.* Forbes, 148 Mass. 249; 19 N. E. 342.

[5] See Part III. Table 7, page 577.

[6] See *In re* Church, etc., 14 Phil. 121; Seaton *v.* Grimm, 110 Ia. 145; 81 N. W. 225.

[7] Clegg *v.* Company, 61 Ia. 121; 15 N. W. 865; Thornton *v.* Balcom, 85 Ia. 198; Bigelow *v.* Gregory, 73 Ill. 197; Field *v.* Cooks, 16 La. Ann. 153; Hunt *v.* Salisbury, 55 Mo. 310; Indianapolis Min. Co. *v.* Herkimer, 46 Ind. 142; Holmes *v.* Gilliland, 41 Barb. 568; Davenport Nat. Bank *v.* Davis, 43 Ia. 424; 15 N. W. 865.

[8] Davenport Nat. Bank *v.* Davis, 43 Ia. 424; 15 N. W. 865. See, however, Clark *v.* Richardson, 17 Ky. Law Rep. 514; 31 S. W. 878; Wing *v.* Slater, 19 R. I. 597; 35 Atl. 302; Heinig *v.* Company, 81 Ky. 300; 5 Ky. Law Rep. 281.

[9] *In re* Sowego Water Co., 38 W. N. C. (Pa.) 148.

§ 73. **Affidavit as to Stock Subscriptions.** — The laws of Florida, Georgia, Illinois, Kansas, Michigan, Missouri, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and West Virginia require in addition to the ordinary acknowledgment of the execution of the articles, that the same be accompanied by an affidavit showing that the amount of stock required by law as a preliminary to doing business as a corporation has been duly subscribed.[1] The same matter appears in the certificate of organization required in Arkansas, Connecticut, Indian Territory, Maine, and Virginia.

On the other hand, the incorporation acts of Alabama, California, Delaware, Idaho, Kentucky, Nevada, New Jersey, New York, North Carolina, Ohio, Virginia, and Washington merely require that the amount of stock subscriptions be set forth in the articles.

As to the content of the affidavits as to stock subscriptions, it is sufficient if they serve to show clearly that the statute relative to the same has been substantially complied with.[2]

Unless the statute designates some officer before whom such affidavit be sworn to, it may be made before any officer authorized to administer oaths and to certify to the same.[3]

§ 74. **Anti-Trust Affidavit.** — Some few of the States — such, for example, as South Dakota, Missouri, and Illinois — require either of the incorporators before organization or of certain designated officers of the corporation after organization that they certify and make oath to the effect that the corporation is organized for the transaction of a lawful business and not for the purpose of enabling the corporation to violate the provision of the anti-trust act in force in that particular Commonwealth. Just what practical purpose the requirements here referred to serve, it would be difficult to say. In its practical operation it is usually a mere formality, and has, so far as observation goes, seldom served any useful purpose.[4]

§ 75. **Special Requirements in Particular States.** — Owing to the varied requirements existing in the several States and Territories relative to the steps necessary to procure charters under

[1] People *v.* Company, 45 Cal. 306.

[2] People *v.* Company, 45 Cal. 306; B. & P. Ry. Co. *v.* Hatch, 20 N. Y. 157.

[3] Wood *v.* Bank, 9 Cowen, 194.

[4] See Ohio St. Ry. Co. *v.* State, 49 O. St. 668; 32 N. E. 933; People *v.* Company, 121 N. Y. 582; 24 N. E. 834; State *v.* Standard Oil Co., 49 O. St. 137; 30 N. E. 279.

the laws thereof, it will be impossible to do more than merely refer to a few of these requirements not already discussed. Under the statutes of some of the States it is necessary before a charter can issue that the capital stock either be subscribed for in whole or in part.[1] In others it is necessary that all or part of the authorized capital stock be actually paid in.[2] However, in many of the States it is not necessary that the capital stock be subscribed for as a condition precedent to corporate existence.[3] Some of the States require that the certificate shall show the amount of the capital stock, the amount actually paid in, and that it shall give the names and residences of the shareholders, and the amount of stock which each has subscribed. Where such provisions exist substantial compliance therewith is essential to the creation of a *de jure* corporation.[4]

Sometimes incorporation acts require that the certificate shall state the maximum amount of indebtedness which the corporation is authorized to incur.[5] In Indiana the articles must contain an impression or description of the seal.[6] In Georgia charters are issued by the courts upon petition therefor. Here as well as in other cases the statute governing the matter must be substantially complied with.[7]

In some States the law requires that the certificate shall set forth the name and location of the principal place of business of the corporation. Such provision must be substantially complied with.[8]

In Pennsylvania, where the incorporation act required the application for a charter to show the place of business of the proposed corporation, and the application merely stated location of its office, it was held insufficient. This for the reason that a corporation may have its office in one place and its place of business in another.[9]

§ 76. **Powers of State Officials Relative to Accepting or Rejecting Articles.** — Where the statute either expressly or by implica-

[1] J. C. G. Company *v.* Dwight, 29 N. J. Eq. 246; Boyd *v.* Company, 90 Pa. St. 169.

[2] People *v.* Chambers, 42 Cal. 201.

[3] See *ante*, sec. 2.

[4] Hendrix *v.* Academy, 73 Ga. 437; Bolling *v.* Le Grand, 87 Ala. 482; 6 Sou. 332.

[5] Sweney *v.* Talcott, 85 Ia. 103; 52 N. W. 106.

[6] See Vawter *v.* Franklin College, 53 Ind. 88.

[7] Van Pelt *v.* Association, 79 Ga. 439; 4 S. E. 501; *In re* Deveaux, 54 Ga. 637.

[8] Montgomery *v.* Forbes, 148 Mass. 249; 19 N. E. 342; *Ex parte* Spring Valley Works, 17 Cal. 132.

[9] *In re* Enterprise Mutual Benefit Ass'n, 10 Pa. 380.

tion bestows upon State officials the duty of examining articles of incorporation and passing upon their legal sufficiency and authorizes State officials to certify that the incorporators have become a corporation, then the issue of such certificate becomes an adjudication that the corporation has been duly formed until the State has vacated the charter by proper proceedings taken in the courts.[1] Usually this duty is bestowed upon the State department which is a branch of the executive, and cannot therefore pass upon questions which are purely judicial.[2] It is confined to an examination as to whether the purposes of the proposed corporation are legal on their face and whether conditions precedent have been complied with so that a charter should properly issue.[3]

The main points to which State officials should address themselves in passing upon corporation papers presented to them are as follows: (1) Have the requisite number of incorporators signed the articles of incorporation? (2) Have the articles been properly acknowledged by the incorporators? (3) Is the corporate name mentioned in the articles one that can be lawfully used by the proposed corporation? (4) Have the statutory requirements relative to the contents of the articles of incorporation been substantially complied with?[4]

Generally speaking, permission to file charters may be refused upon the following grounds: If the name of the proposed corporation is identical or closely resembles that of an existing corporation, the State officials may exercise their discretion and refuse to pass the charter.[5]

It has been held, however, by a court of excellent authority that a statute prohibiting the corporation from assuming a name in use by any other organization or so closely analogous to it as to mislead the public is designed to protect domestic corporations.[6]

[1] Boyce *v.* M. E. Church, 46 Md. 359; D. H. R. R. Co. *v.* Marsh, Fed. Cas. 4014.

[2] Granby Co. *v.* Richards, 95 Mo. 106; 8 S. W. 246; Van Pelt *v.* Gardner, 54 Neb. 701; 75 N. W. 874.

[3] P. R. T. Rd. Co. Charter Application, 20 Pa. County Ct. Rep. 151; N. M. G. T. Co. *v.* N. G. T. Co., 21 Pa. County Ct. Rep. 393; People *v.* Company, 130 Ill. 268; 22 N. E. 798.

[4] State *v.* National Inv. Co., 88 Wis. 512; *In re* Application for Charter, 5 Pa. Dis. Rep. 243; *In re* Application for Charter St. L. Ass'n, 19 Pa. County Ct. Rep. 25; *In re* DuQuesne College Charter, 12 Pa. County Ct. Rep. 491; Woodberry *v.* McClurg, 78 Miss. 831; 29 Sou. 514.

[5] State *v.* McGrath, 92 Mo. 355; 5 S. W. 29; American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189; 47 Atl. 936; People *v.* Payne, 161 N. Y. 229; 55 N. E. 849.

[6] People *v.* H. L. A. Co., 111 Mich. 405; 69 N. W. 653.

Generally speaking, the action of the Secretary of State in issuing a license or certificate of incorporation is ministerial.[1] Neither State officials nor the courts can with respect to incorporation add new conditions to those prescribed by statute.[2] Generally, the test of the extent of powers of ministerial offices is the right to compel performance by mandamus.[3]

It is an almost universal rule that after the certificate is once issued, the officer who issues it has no power to revoke the certificate. For this purpose application must ordinarily be made to the courts.[4]

§ 77. **Right to Mandamus State Officials for refusing to file Articles.** — Ordinarily mandamus is the proper remedy where State officials refuse to file a certificate of incorporation, provided the duty of receiving and filing the same is lodged with them.[5]

§ 78. **Organization Tax.** — By the term "organization tax," as here used, is to be understood the amount of money exacted by the State from individuals in return for a grant from the former to the latter of the right or privilege of being a corporation; that is, of doing business in a corporate capacity and under the privilege or franchise which when incorporated the company may exercise. The right or privilege to be a corporation or to do business as such body is one generally deemed of value to the corporation, which is the right or privilege by which several individuals may unite themselves under a common name and act as a single person with a succession of members without dissolution or suspension of business and with a limited individual liability. The grant of such a right or privilege rests entirely in the discretion of the State, and may unquestionably be accompanied with such conditions as the legislature thereof may judge most befitting to its interests and policy.

Thus the latter may require of the incorporators, as a condition to the original grant of the franchise as well as of its continued exercise, that the corporation pay a specific sum to the State.[6]

[1] People *v.* C. G. T. Co., 130 Ill. 269; 22 N. E. 798.

[2] Hastings *v.* A. P. Co., 29 Wash. 224; 69 Pac. 776.

[3] F. B. Co. *v.* Wood, 14 Ga. 80.

[4] See, however, I. W. C. Co. *v.* Pearson, 140 Ill. 423; 31 N. E. 400; *In re* N. I. E. Co., 142 Pa. St. 450; 21 Atl. 879.

[5] People *ex rel.* N. Y. P. Co. *v.* Rice, 128 N. Y. 59, 28 N. E. 251; H. W. I. Co. *v.* N. Y. H. I. Co., 140 N. Y. 94; 35 N. E. 417; State *v.* Taylor, 55 O. St. 61. 44 N. E. 513; State *v.* McGrath, 92 Mo. 355; 5 S. W. 29; Illinois Watch Case Co. *v.* Pearson, 140 Ill. 423; 31 N. E. 400.

[6] Home Insurance Co. *v.* People of the State of New York, 134 U. S. 594; 10 S. Ct. 593; 33 L. E. 1025; Gordon *v.* Appeal Tax Court, 44 U. S. (3 How.) 133; 11 Law Ed. 529; B. & O. Ry. Co. *v.* Maryland, 88 U. S. (21 Wall.) 456; 22 L. E. 678; People *v.* Rose, 210 Ill. 582; 71 N. E. 580.

There are two broad grounds for sustaining the power of the State to impose organization taxes. The first of these is their inherent power to regulate corporations. Corporate capacity itself is a franchise. No persons can make themselves a body corporate and politic without legislative authority.[1] The other ground referred to is the inherent power of the State to enact such legislation as may be necessary in order to raise revenue for State purposes.[2]

The term "organization tax" should be carefully distinguished from the phrase "franchise tax;" the latter referring to the tax imposed by the State upon corporations for the privilege of doing business in a corporate capacity after incorporation. All of the States and Territories with the exception of Arizona, Arkansas, District of Columbia, Georgia, Indian Territory, Louisiana, and Oklahoma, impose graduated organization taxes upon corporations organized under their laws. There can be no question as to the validity of such graduated taxation.[3] The same is true even when in such matters the legislature distinguishes, as is the case in West Virginia and New Hampshire, between resident and non-resident domestic corporations.[4]

At the present time it is a rule of almost universal application that the payment of an organization tax is a condition precedent to corporate existence.[5] Organization taxes cannot be evaded on the ground that the corporation calls itself an "eleemosynary" corporation when in fact it is otherwise.[6]

The State is not bound to permit corporations to consolidate or to extend their corporate existence, and for this reason it may lawfully impose the payment of an organization tax as a condition precedent to consolidation or to the extension of its corporate existence.[7]

[1] California *v.* Company, 127 U. S. 1; 8 S. Ct. 1073; 32 L. E. 157.

[2] Baker *v.* Cincinnati, 11 O. St. 534; W. U. T. Co. *v.* Attorney-General, 125 U. S. 530; 8 S. Ct. 961; 31 L. E. 790.

[3] See Ashley *v.* Ryan, 49 O. St. 504; 31 N. E. 721; 153 U. S. 436; 14 S. Ct. 865; 38 L. E. 773.

[4] B. J. C. C. Co. *v.* Scherr, 50 W. Va. 533; 40 S. E. 514.

[5] Union Horseshoe Works *v.* Lewis, 1 Abb. (U. S.) 518; Fed. Cases, No. 14383; Combined Saw & Planer Co. *v.* Flournoy, 88 Va 1029; 14 S. E. 976; Edwards *v.* Denver & R. G. R. Co., 13 Col. 59; 21 Pac. 1611; State *v.* Rotwitt, 17 Mont. 41; 41 Pac. 1004; Ashley *v.* Ryan, 49 O. St. 504; 31 N. E. 721; H. M. Co. *v.* Bremer, 12 R. I. 491.

[6] State *v.* Lesueur, 99 Mo. 552; 13 S. W. 237.

[7] Ashley *v.* Ryan, 49 O. St. 504; 31 N. E. 721; 153 U. S. 436; 14 S. Ct.

§ 79. **Form in which Charter is granted.** — In only twenty-nine of the States do the corporation acts expressly provide for the issuance of a certificate of incorporation or charter by State officials. In some few of the remainder the power to issue such instruments is assumed by the officers having the matter in charge without any express authorization therefor in the statute. In the remaining States proof of incorporation is usually had by procuring certified copies of the articles of incorporation. The matter becomes one of practical importance in connection with the right of third parties to collaterally attack not only the corporate existence but the corporate purposes and powers as well. This matter has already been discussed at length in a previous section.[1]

Ordinarily the commencement of corporate existence dates from the time when the certificate of incorporation is issued. Where the statute expressly provides for the issuance of a charter by State officials the latter have no discretion in the matter, and must issue the same upon demand of the parties who have legally entitled themselves to the same.[2] The certificate must be issued immediately, and must be in the form, if any, prescribed by the statute.[3] The Secretary of State should always affix his seal to the certificate of incorporation.[4]

§ 80. **Filing and Recording in Local County Offices.** — Generally speaking, it is part of the plan adopted by the various legislatures in the enactment of general incorporation acts, to provide in addition to requiring that articles of incorporation be filed with some designated State official, that they always be filed in one or more local county offices.[5] Usually the latter requirement is confined to the provision that they be filed in the county where the corporation's domiciliary office is located. However, in some few of the States such articles must be filed in every county wherein the corporation transacts its business or holds real property. In some of the States, such as California and Maryland, more importance appears to be attached to the filing of the articles in the local county office than with State officials.[6]

865; 38 L. E. 773; People *v.* Pfister, 57 Cal. 532.

[1] See *ante*, § 6.

[2] State *v.* Taylor, 55 O. St. 61; 44 N. E. 513; Sparks *v.* Company, 87 Ala. 294; 6 So. 195.

[3] Stowe *v.* Flagg, 72 Ill. 397; R. F. Ass'n *v.* Clarke, 61 Me. 351; Sparks *v* Company, 87 Ala. 294; 6 So. 195; People *v.* Payn, 161 N. Y. 229; 55 N. E. 849.

[4] Benner *v.* State, 7 Lea (Tenn.), 682.

[5] See Part III. Table 4, page 574.

[6] See N. H. C. & M. Co. *v.* Woodberry, 14 Cal. 434.

The purpose of filing articles in county offices has been said to be in order that persons dealing with the corporation may have an easy and public inspection of the basis of its corporate organization.[1] With some few exceptions corporate existence is not made to depend upon the filing of the articles in the local county offices. In any event, where such filing is not had, the corporation is treated as a corporation *de facto*, if not *de jure*.[2] The foregoing is certainly true in the absence of any proceedings by the State in the nature of *quo warranto*.[3]

In some States the filing of articles in designated offices is specifically made a condition precedent to the legal existence of the corporation, while in others it is merely made a condition precedent to the right of the corporation to engage in business as such.[4] It has been held, however, in Missouri that in order to the creation of corporate existence articles must be filed in both State and county offices.[5]

At the present time it is safe to say that as to third parties the validity of corporate existence will be presumed even when articles have not been filed in local county offices as required. But in some jurisdictions attempts have been made to hold the incorporators liable as partners under such conditions.[6]

§ 81. **Distinction between de jure and de facto Corporations.** — A corporation *de jure* is one whose right to exercise corporate functions would prove invulnerable if assailed by the State in *quo warranto* proceedings.[7] A *de facto* corporation, on the other hand, is one the legality of whose existence may be inquired into by the State in *quo warranto* proceedings. The general rule is that to prove the existence of a corporation *de facto* it is necessary to

[1] Loverin *v.* McLaughlin, 161 Ill. 417; 44 N. E. 99.

[2] Curtis *v.* Tracey, 62 Ill. Ap. 49; B. & T. Co. *v.* Gade, 55 Ill. 181; Johns *v.* People, 25 Mich. 499; Whitney *v.* Wyman, 101 U. S. 392.

[3] Bank *v.* Davies, 43 Iowa, 424; Martin *v.* Deetz, 102 Cal. 55; 36 Pac. 368; I. T., etc. Co. *v.* Herkimer, 46 Ind. 142; Humphreys *v.* Mooney, 5 Col. 282; Sims *v.* Commonwealth, 24 Ky. L. Rep. 159; 71 S. W. 929; Childs *v.* Hurd, 32 W. Va. 66; 9 S. E. 362; Abbott *v.* Co., 4 Neb. 416.

[4] Bergeron *v.* Hobbs, 96 Wis. 641; 71 N. W. 1056; *In re* Shakopee Mfg. Co., 37 Minn. 91; 33 N. W. 219; G. M. & S. Co. *v.* Richards, 95 Mo. 106; 8 S. W. 246.

[5] Hurt *v.* Salisbury, 55 Mo. 310.

[6] See P. & G. T. Co. *v.* Bobb, 88 Ky. 226; 10 S. W. 794; Rassbeck *v.* Desterricher, 55 How. Pr. 516; 4 Abb. New Cases, 444; F. G. B. & T. Co. *v.* Gade, 55 Ill. 181; N. Y. N. Exchange Bank *v.* Crowell, 177 Pa. 313; 35 Atl. 613; Clegg *v.* Company, 61 Ia. 121; 15 N. W. 865; Gent *v.* Company, 107 Ill. 652; Childs *v.* Hurd, 32 W. Va. 66; 9 S. E. 362.

[7] Clapp *v.* Company, 40 Neb. 470; 28 N. W. 956.

show (1) an act authorizing the creation of a corporation of that character; (2) an application duly made thereunder by the requisite number of incorporators praying for incorporation. (3) It is sometimes necessary, although not always, to show user thereunder.[1]

§ 82. **Right of Parties other than the State to collaterally impeach Corporate Existence.** — The right here referred to has already been considered somewhat at length in connection with a discussion of the right of third parties to collaterally attack corporate purposes and powers.[2] There are some additional matters, however, not already discussed to which attention will now be called.

As has already been suggested, the courts have taken varied and conflicting views relative to the right of parties other than the State to collaterally attack the existence of a corporation with whom they chance to be involved in litigation. The diverging views here referred to may be classified as follows: (1) the view that the State alone can test the question whether or not a corporation which has procured a charter from the proper State officials is in law as well as in fact a corporation;[3] (2) the view that this question may be inquired into by third parties, but that it is sufficient in such cases for the corporation to show substantial compliance with the conditions prescribed by the general incorporation act in order to prove that it is a corporation *de jure* as well as *de facto*;[4] (3) the view that the matter may be inquired into by third parties, and that under such circumstances it is necessary that the corporation shall show strict compliance with each and every condition precedent prescribed by the general incorporation act in order to establish the fact that it is a corporation *de jure* as well as *de facto*.[5]

For purpose of convenience these three diverging views may be

[1] Stout *v.* Zulick, 48 N. J. Law, 599; 7 Atl. 362; Haas *v.* Bank, 41 Neb. 754; 60 N. W. 85; Duggan *v.* Company, 11 Col. 113; 17 Pac. 105; Central Ag., etc. Ass'n *v.* Company, 70 Ala. 120; Baker *v.* Backus, 32 Ill. 79; Hughes *v.* Bank, 5 Litt. (Ky.) 45; Buffalo, etc. Ry. Co. *v.* Cary, 26 N. Y. 75; Finnegan *v.* Noerenberg, 52 Minn. 239; 53 N. W. 1150; Continental Trust Co. *v.* T., etc. Ry. Co., 82 Fed. 642; City of Guthrie *v.* Territory, 1 Okla. 188; 31 Pac. 190; A. L., etc. Co. *v.* M., etc. R. Co., 157 Ill. 641; 42 N. E. 153; *In re* Gibbs Estate, 157 Pa. St. 59; 27 Atl. 383.

[2] See *ante*, § 6.

[3] See *ante*, § 6.

[4] Jones *v.* Company, 21 Col. 263; 40 Pac. 457; Stout *v.* Zulick, 48 N. J. L. 599; 7 Atl. 362; Finnegan *v.* Noerenberg, 52 Minn. 239; 53 N. W. 1150.

[5] Mokelumne, etc. Co. *v.* Woodbury, 14 Cal. 424; Lucas *v.* Bank, 2 Stew. (Ala.) 147.

distinguished as follows: referring to the first as to the true, the second as the substantial compliance, and the third as the strict compliance rule. Space will permit of discussion here of only the first of the rules just referred to.

The legislatures alone, as has been shown, can create a corporation. Under the modern practice these bodies have passed general incorporation acts entrusting the execution of the law to the executive department of the government. Under the rule now generally established, either by statute or judicial construction, in most of the States a corporation becomes a corporation *de facto* from the moment the charter or certificate of incorporation is issued by the proper State authorities.[1] The basis of holding such certificates as conclusive of corporate existence as against all the world except the State is that where by reason of such certificate a corporation is held out to the world as ready to undertake business, most disastrous consequences would follow to commercial undertakings if any private person was allowed to go back and enter into an examination of the circumstances attending the original incorporation.[2]

The power which creates the corporation it is needless to say should alone have the power to take it away. It should not be permitted to parties other than the State for this reason to collaterally impeach corporate existence, for to permit such impeachment would be in legal effect to permit third parties, for the purpose at least of that particular action, to destroy the effect of the previous action of the State in the premises. On grounds of public policy as to all parties but the State, it should under such circumstances be conclusively presumed that the statutory requirements relative to incorporation have been duly complied with.[3] A corporation must of necessity be presumed to be rightfully in possession of the franchise and rightfully exercising the power which the legislative grant confers. Individual right is not invaded if the presumption is true in fact and there is no usurpation. It is the State — the sovereign — whose rights are invaded and whose authority is usurped. The individual could not create the corporation, could not grant, define, or limit its powers; any grant of these by the sovereign cannot

[1] See *ante*, § 6.

[2] Lake Superior Co. *v.* Morrison, 22 Canada C. P. 224.

[3] Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520; Welch *v.* Bank, 122 N. Y. 177; 25 N. E. 269.

lessen his right. There can consequently be no cause of complaint by the citizen, and no right to inquire whether the corporate existence is rightful, *de jure*, or merely colorable.[1]

Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the same protection of the law and governed by the same legal principles as those of the former so long as the State acquiesces in their existence and exercise of corporate functions. A private citizen whose rights are not invaded and who has no cause of complaint has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the State from whom is derived the right to exist as a corporation and whose authority is usurped.[2]

A corporation *de facto* may legally do and perform every act and thing which the same entity could do and perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of powers, its acts are to be treated as efficacious.[3]

Finally, it may be observed that the principle here contended for has been held by at least one court to be applicable to a case where a corporation had incorporated under an unconstitutional law, yet nevertheless the validity of the corporation's existence could not be collaterally attacked, as it had been chartered by the implied consent of the State.[4]

§ 83. **Right of State to attack Corporate Existence in Direct Proceedings.** — This section has reference only to actions brought by the State for the purpose of testing the legality of corporate existence where it is alleged that there has been a failure on the part of the incorporators to perform all the conditions prescribed by statute as a precedent to corporate existence. The action here referred to is that of *quo warranto*, which, even in the absence of statutory provision, may be maintained at common law in behalf of the State against incorporators who assume to exercise corpo-

[1] Lehman *v.* Warner, 61 Ala. 455.
[2] Snider's Sons' Co. *v.* Troy, 91 Ala. 224; 8 So. 658; Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520.
[3] People *v.* LaRue, 67 Cal. 526; 8 Pac. 84.
[4] Richards *v.* Bank, 75 Minn. 196; 77 N. W. 822.

rate powers without being legally incorporated, for the purpose of ousting them from the exercise of such powers.[1]

In all such proceedings as against the State not merely a *de facto* corporate existence must be shown, but a *de jure* existence as well. The general prevailing view at the present time seems to be that, as against the State in such proceedings, it is necessary to show a specific statute authorizing the creation of corporations of the character of the one against which the *quo warranto* proceedings are brought, and also substantial compliance in the preliminary organization of the corporation with all conditions precedent prescribed by statute.[2]

In *quo warranto* proceedings the burden of proof is upon the corporation to show that it has been legally incorporated.[3] In the proceedings of the character referred to it has been well said that "public policy demands that the power to oust *de facto* corporations from the exercise of corporate powers because of failure to comply substantially with conditions precedent be sparingly exercised."[4]

Were the rule otherwise, disastrous consequences would follow in the commercial world, and in all such cases the courts should take extraordinary care to see that the rights of third parties are fully protected. In proceedings brought by the State, the most important matter to be looked at is whether there has been a failure on the part of the incorporators to comply with the provisions of the statute, which are merely directory as opposed to those that are mandatory. A "directory" provision is one which the legislature did not intend as essential to corporate existence, and the failure to comply with which is a mere irregularity and is not fatal to corporate existence. A "mandatory" provision, on the other hand, is one which must be substantially complied with in order to create a corporation *de jure*.[5] Whether the particular provision of the statute is directory or mandatory is to be determined by "the intention and true meaning of the legislature deduced from the act and sometimes aided by other acts *in pari*

[1] Greene *v.* People, 150 Ill. 513; 37 N. E. 842.
[2] State *v.* Webb, 97 Ala. 111; 12 So. 377; People *v.* Selfridge, 52 Cal. 331; State *v.* Critchett, 37 Minn. 13; 32 N. W. 787; Holman *v.* State, 105 Ind. 569; 5 N. E. 702.
[3] People *v.* Lowden (Cal.), 8 Pac. 66.
[4] Duggan *v.* Company, 11 Colo. 113; 17 Pac. 105.
[5] Newcomb *v.* Reed, 12 Allen, 362; B. W. S. Co. *v.* Inhabitants of Braintree, 146 Mass. 482; 16 N. E. 420.

materia and extraneous circumstances."[1] Even as against the State it is only necessary that a mandatory provision shall be substantially complied with.[2]

§ 84. **When does Corporate Existence commence?** — Where the statute provides, as it does in some of the Commonwealths, that the articles of incorporation shall be filed with State officials or in some local county office or both, the general rule is that the corporate existence dates from the time of filing of the articles with such officials and not from the time it begins to do business.[3] The foregoing seems to be the rule in force in the majority of States. Some of the States, however, provide by statute as to when corporate existence shall commence, as, for example, Alabama, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.[4] In a number of the States corporate existence depends not merely upon filing articles with the Secretary of State, but also upon filing the same in the local recording office of the county where the principal place of business of the corporation is to be located, as, for example, in Arizona, California, Colorado, Delaware, Idaho, Maryland, Montana, New Jersey, Utah, and Wisconsin. In some few of the States the statute by reason of its peculiar provision seems to contemplate the corporate existence shall commence before the filing of articles of incorporation with any official, either State or county; this for the reason that the certificate required to be filed with such officials must be signed by corporate officers. States to which reference is here made are Arkansas, Illinois, Indian Territory, Maine, Massachusetts, Michigan, and Missouri.

[1] Cross *v.* Company, 17 Ill. 54; Eakright *v.* Company, 13 Ind. 404; Newcomb *v.* Reed, 12 Allen, 362.

[2] People *v.* Company, 97 Cal. 276; 32 Pac. 236; State *v.* White, 13 Mo. Appeals 139; People *v.* Cheeseman, 7 Colo. 376; 3 Pac. 716; Newcomb *v.* Reed, 12 Allen, 362; Eakright *v.* Company, 14 Ind. 404; Walworth *v.* Bracket, 19 Mass. 98; B. W. S. Co. *v.* Inhabitants of Braintree, 146 Mass. 482; 16 N. E. 420.

[3] Hanna *v.* Company, 23 O. St. 622; G. M. & S. Co. *v.* Richards, 95 Mo. 106; 8 S. W. 246; Humphreys *v.* Mooney, 5 Colo. 293; V. C. Railway Co. *v.* Clayes, 21 Vt. 30; Borough of Braddock *v.* Company, 189 Pa. 379; 42 Atl. 15; Badger Paper Co. *v.* Rose, 95 Wis. 45; 70 N. W. 302; Hunt *v.* Company, 11 Kan. 412.

[4] See Part II., Synopsis-Digest of the Corporation Laws of the several States and Territories.

There seems to exist in some jurisdictions the theory that in the matter of determining when the corporate existence commences reference must be had, first, to the primary franchise of being a corporation vesting in the incorporators and next to the secondary franchise to do certain specific acts which vests in the corporation.[1] Again, in some States, while filing articles of incorporation constitutes a condition precedent to the creation of corporate existence, it is also a condition precedent to the right of doing business.[2]

Ordinarily corporate existence does not commence until all conditions precedent are performed.[3] There is a very obvious distinction between such acts as are declared to be necessary steps in the process of incorporation and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. With respect to the former any material omission will be fatal to its existence as a corporation *de jure*, as against the State. In respect to the latter, failure to comply therewith is not ordinarily accompanied by forfeiture of its charter powers, but rather goes to the question of the personal liability of the individuals who attempt to do business as a corporation without having complied with all the conditions subsequent.[4]

Corporate existence in this immediate connection ordinarily means full authority to transact business as such in contradistinction to the qualified existence of such corporations which dates from the time of filing the articles of association with the Secretary of State.[5] So too, in those States where organization precedes the filing of a certificate of incorporation, it has been held that a corporation has a qualified existence from the date of the incorporators' first meeting.[6]

In Illinois corporate existence does not commence until the reception of a license from the Secretary of State to take stock

[1] State *v.* Water Co., 61 Kan. 547; 60 Pac. 337.

[2] Gade *v.* Company, 165 Ill. 367; 46 N. E. 286; Martin *v.* Deetz, 102 Cal. 55; 36 Pac. 368; *In re* S. M. Co., 37 Minn. 91; 33 N. W. 219; Johns *v.* People, 25 Mich. 499; G. M. & S. Co. *v.* Richards, 95 Mo. 106; 8 S. W. 246.

[3] Afferton *v.* Company, 67 Ind. 334; Borough of Braddock *v.* Company, 189 Pa. St. 379; 42 Atl. 15; Badger Paper Co. *v.* Rose, 95 Wis. 145; 70 N. W. 302.

[4] Herrod *v.* Hamer, 32 Wis. 162; E. G. L. Co. *v.* Green, 46 N. J. Eq. 118; 18 Atl. 844; M. H. M. Co. *v.* Woodbury, 14 Cal. 424.

[5] Hurt *v.* Salisbury, 55 Mo. 310.

[6] S. G. & P. Co. *v.* Scholfield, 70 Conn. 500; 40 Atl. 182.

subscriptions.[1] It would of course follow, from the necessities of the case, that before a corporation can contract as such, it must have a full and complete organization.[2] While ordinarily such organization is not necessary to the commencement of corporate existence, it is sometimes made so by statute.[3]

[1] Stowe *v.* Flagg *et al.*, 72 Ill. 397; Curran *v.* Bradner, 27 Ill. Ap. 582.
[2] Gent *v.* Company, 107 Ill. 652.
[3] A. & N. T. Ry. Co. *v.* Smith, 15 O. St. 328; U. R. Co. *v.* Holden, 63 N. C. 410; Teitig *v.* Boesman, 12 Mont. 404; 31 Pac. 371.

CHAPTER III.

ORGANIZATION OF CORPORATIONS AFTER INCORPORATION

§ 85. **The Incorporators' Organization Meeting.** — That a corporation shall have a full and complete organization and existence as an entity before it can enter into any kind of contract or transact any business, would seem to be self-evident. A corporation until organization has no franchises or faculties. Its existence before is but a qualified existence. Its powers are limited for the time being to the right to organize itself into an active corporate organization, and, as we have seen, those engaged in bringing it into being have no power to bind it by contract unless so authorized by the charter. Until organization as authorized by the charter, it does not possess the right to exercise its corporate functions, nor has it a valid existence for all purposes.[1]

In this connection it was observed in a leading case, that "it is often stated in the books that a corporation is created by its charter. This is not precisely correct. The charter only confers the life and provides the instruments by which it may become an acting entity. Such a corporation has been well defined to be an artificial being, existing only in contemplation of law. The instruments provided to bring the artificial being into active operation are the persons named in the charter, and those who by virtue of its provisions may become associated with them. These persons — the incorporators — as natural persons have no such power. The charter confers upon them a new faculty for this purpose, a faculty which they can have only by virtue of the law which confers it."[2]

The better, if not the prevailing, rule appears to be, that not only are the incorporators named in the articles of incorporation entitled to participate in the organization meeting thereof, but also all subscribers to the preliminary stock subscription to the capital stock of the proposed corporation may do so.[3]

[1] Gent *v.* Company, 107 Ill. 652.
[2] Miller *v.* Ewer, 27 Me. 509.
[3] Baltimore City Pass. Ry. Co. *v.* Hambleton. 77 Md. 341; Spear *v.* Crawford,

§ 86. **Organization Meeting, how called.** — The more recent incorporation acts, such as are in force in Connecticut, Maine, Massachusetts, New Jersey, North Carolina, and West Virginia, point out specifically how the organization meeting of a corporation is to be called. Where no such statutes exist the better and safer practice is for all the incorporators, as well as the subscribers to the preliminary subscription agreement to the capital stock of the proposed corporation, to sign a waiver and agreement fixing the time and place for the organization meeting of the corporation.[1]

It has been held that all are not required to be present at the organization meeting who sign the articles of incorporation unless the statute requires it. A majority, it is said, is sufficient.[2] The safer practice, however, is to comply with the rule stated above.[3]

Virginia is one of the few States possessing a statute giving the incorporators the right to assign their interests as such in a prospective corporation. Failure to call a meeting as provided by statute is to be regarded as a breach of a condition subsequent and is not fatal to the creation of a valid corporation.[4]

§ 87. **Organization Meeting, where held.** — It was laid down at an early date by the Supreme Court of Maine in Miller *v.* Ewer,[5] that all acts and proceedings of persons pretending to act in the capacity of incorporators when assumed without the bounds of the sovereignty granting the charter are absolutely void. The principle established in Miller *v.* Ewer has been quite generally adopted in other parts of the country.[6]

The reasoning of these cases is to the following effect: the charter bestows upon the incorporators certain privileges which

1 4 Wend. 24; Nickum *v.* Burkhardt, 30 Ore. 464; 47 Pac. 788; Waukon, etc. Ry. Co. *v.* Dwyer, 49 Ia. 121; Instone *v.* Company, 2 Bibb. (Ky.) 578; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Haskell *v.* Read (Neb.), 93 N. W. 997.

2 B. B. R. Co. *v.* Buck, 68 Me. 81.

3 Packard *v.* Co., 168 Mass. 92; 46 N. E. 433.

4 See Babbitt *v.* E. J. I. Co., 1 Stew. Dig. 208, § 13, not otherwise officially reported (1876); Walworth *v.* Bracket, 98 Mass. 98.

5 McClinch *v.* Sturges, 72 Me. 288; Braintree Water Supply Co. *v.* Braintree, 146 Mass. 482; 16 N. E. 420; *In re* British Sugar Refining Co., 3 Kay & J. 408; Porter *v.* Robinson, 40 Hun (N. Y.), 209.

5 27 Me. 509.

6 Freeman *v.* Company, 38 Me. 343; Smith *v.* Company, 64 Md. 85; 20 Atl. 1032; Camp *v.* Byrne, 41 Mo. 525; Humphreys *v.* Mooney, 5 Col. 282; Duke *v.* Taylor, 37 Fla. 64; 19 So. 172; Miller *v.* Parrish, 14 N. J. Eq. 380; Ormsby *v.* Company, 56 N. Y. 623; Mitchell *v.* Company, 40 N. Y. Sup. Ct. 406; F. T. L. Co. *v.* Laigle, 59 Texas, 339; Hodgson *v.* Company, 46 Minn. 454; 49 N. W. 197; Ohio, etc. Ry. Co. *v.* McPherson, 35 Mo. 13; Arms *v.* Conant, 36 Vt. 744; Galveston, etc. Ry. Co. *v.* Cowdrey, 11 Wall. 459; Runyan *v.* Coster, 14 Peters, 122; Augusta Bank *v.* Earle, 13 Peters, 519; Wright *v.* Lee, 2 S. D. 596; 57 N. W. 706.

they can possess only by virtue of the law which confers it; that law is inoperative beyond the bounds of the legislative power by which it was enacted; that, as the foregoing faculty cannot accompany the incorporators beyond the bounds of the sovereignty which creates it, they cannot possess or exercise it there, and can have no more power there to make the artificial being act than other persons not named or associated as incorporators. Therefore any attempt to exercise such a faculty there is merely a usurpation of authority by persons destitute of it and acting without any legal capacity to act in that manner. If the foregoing reasoning be sound, it follows that all fundamental corporate acts and proceedings when assumed without the bounds of the sovereignty granting the charter are absolutely void. The principle here stated has been materially qualified in a large number of jurisdictions by an extended application of the doctrine of estoppel. As an example of this, attention is called to the case of Handley *v.* Stutz.[1]

This was a case where a Kentucky corporation at a meeting of the stockholders of the corporation, held outside of the State, increased the capital stock of the company from one hundred twenty thousand dollars to two hundred thousand dollars. It was contended that this increase was illegal, for the reason that the meeting of the stockholders authorizing it was held outside of the State of Kentucky. The court, in its opinion upon this point, spoke as follows:

"Nor were the proceedings of such meeting any less binding upon those participating in it by reason of the fact that it was held outside of the boundaries of the State under the laws of which the company was incorporated. By act of the Kentucky Legislature, it is provided, that all elections for directors and other officers by private corporations shall be held within the territorial limits of the State of Kentucky, and that any such election held outside of Kentucky shall be void. Beyond the election of officers, however, there is no statutory restriction of corporate action to the limits of the State, and in the absence of such inhibition the proceedings of such meeting would, with regard to directors' meetings, be binding upon all those participating in it, as well as upon those acting upon the faith of its validity or receiving the stock authorized to be issued at said meeting. It is true that there are cases holding that stockholders'

1 139 U. S. 417; 11 S. Ct. 530.

meetings cannot be legally held outside of the home State of the corporation, but the question has generally arisen where a majority present had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons. Indeed, so far as we know, the authorities are uniform to the effect that the action taken at such meeting was binding upon those who participated in or partook of the benefits of them. In this case the meeting was attended by all the stockholders but two, who were present by proxy. The vote increasing the stock was unanimous, and it does not lie in the mouth of those who participated in this act, or received the stock voted at this meeting, to question its validity."[1]

Unquestionably the legislature has the legal right, in the absence of constitutional provision, to provide that all meetings of corporations, whether organization or otherwise, may be held outside the State.[2]

§ 88. **Steps Necessary to complete Organization.** — The principal matters which demand attention at the organization meeting of a corporation may be enumerated as follows: (1) the adoption of by-laws; (2) election of directors; (3) providing for the issue and payment of the capital stock of the corporation. The subject of the adoption of by-laws and the payment of the capital stock of the corporation will be left for subsequent consideration.

With respect to the matter of the election of a board of directors the following may be said. Many of the incorporation acts require that the names of the first board of directors shall be set forth in the articles of incorporation, and this ordinarily obviates the necessity of electing a new board at the organization meeting of the corporation.[3] Unless the statute so requires it, it is not necessary, in order to give the incorporators the right to participate in the organization meeting, that they be stockholders.[4] But ordinarily it is contemplated by the incorporation acts that the incorporators shall be stockholders or subscribers for capital stock.

[1] See to the same effect Heath *v.* S. L. Min. Co., 39 Wis. 146; O. & M. Ry. Co. *v.* McPherson, 35 Mo. 13; Ormsby *v.* Vermont Min. Co., 56 N. Y. 632; Humphrey *v.* Mooney, 5 Col. 282; Wright *v.* Lee, 2 S. D. 596; 57 N. W. 706; T. M. Co. *v.* Goodhue, 18 N. C. 981.

[2] Graham *v.* Co., 118 U. S. 161; 6 Sup. Ct. 1009.

[3] Hamilton Trust Co. *v.* Clemens, 163 N. Y. 423; 57 N. E. 614.

[4] Hammond *v.* Straus, 53 Md. 1; Perkins *v.* Berders, 56 Miss. 733; Proprietors, etc. *v.* Dickinson, 6 Gray (Mass.), 586; Coyote *v.* Ruble, 8 Oregon, 284; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Singer Mfg. Co. *v.* Peck, 9 S. D. 29; 67 N. W. 947; Ramsey *v.* Tod, 95 Texas, 614; 69 S. W. 133; Byrnes *v.* Beck, 10 Ga. 121; B. B. & T. Co. *v.* J. B. T. Co. 101 Tenn. 545; 48 S. W. 228; Wechselberg *v.* Bank, 64 Fed. 90.

The right to vote stock is an incident to stock ownership, and was recognized at common law as a property right.[1]

In some few of the States, statutes exist limiting the right of stockholders to own more than a certain percentage of the total stock of the corporation.[2]

Sometimes the incorporators are appointed commissioners to take stock subscriptions. It has been held that the failure of such commissioners to take the oath of office as required by statute, will not render the subscriptions void.[3] Where authority to open books of subscription is given by statute to the incorporators, this authority may be exclusive, so that subscriptions cannot lawfully be received by others. Such subscriptions, however, may of course be ratified by proper parties.[4]

Ordinarily the election of officers is by statute devolved upon the board of directors. However, in some few of the States certain officers are required to be elected by the stockholders.

§ 89. **Adoption of By-Laws.** — A by-law is in effect a continuing rule of action for the government of the corporation, its members and officers.[5] The purpose of a by-law is to regulate and define the duties of the stockholders between themselves and the conduct of the officers and the management of the corporate affairs.[6]

All corporations have the implied power to make by-laws for the government of the corporation and the management of its affairs.[7] Unless otherwise provided by statute, the by-laws must be adopted by the incorporators at their organization meeting or else by the stockholders at a meeting duly called for that purpose.[8]

Some few of the States, among them being South Dakota, North Dakota, and Oklahoma, permit incorporators to adopt by-laws, whether they are subscribers for the capital stock of the proposed corporation or not. Statutory provisions exist in several of the

[1] Commonwealth *v.* Dalzell, 152 Pa. St. 217; 25 Atl. 535.

[2] Mack *v.* Company, 90 Ala. 396; 8 So. 150; Commonwealth *v.* Detwiller, 131 Pa. St. 614; 18 Atl. 990. On right of corporation to vote its own shares see McNeely *v.* Woodruff, 13 N. J. L. 352; *Ex parte* Holmes, 5 Cowen (N. Y.), 426; on right of corporations to vote shares in another corporation see Davis *v.* Company, 77 Md. 35; 25 Atl. 982.

[3] Hollman *v.* Company, 9 Gill & J. (Md.) 462.

[4] N. C. M. Ry. Co. *v.* Eslow, 40 Mich. 222.

[5] N. M. T. S. Co. *v.* Bishop, 103 Wis. 492; 79 N. W. 785.

[6] Flint *v.* Pierce, 99 Mass. 70.

[7] Engelhardt *v.* Association, 148 N. Y. 281; 42 N. E. 710.

[8] M. G. R. Co. *v.* Wysong, 51 Ind 12.

states, expressly permitting provision to be made, if desired, for the adoption of by-laws by the directors. In the absence of any such statutory authority, by-laws adopted by the directors are not binding unless subsequently ratified by the stockholders.[1] On the other hand, if the directors are vested by statute with exclusive power to pass by-laws, those passed by the stockholders are not valid.[2]

The adoption of by-laws is a constituent act, and for this reason they must be adopted within the State by whose laws the corporation was created, if action of stockholders is necessary to their adoption.[3] In the absence of statutory power or charter provision, by-laws can be altered or repealed by the stockholders alone.[4]

In the absence of statutory prohibition, the power to amend or alter by-laws may be delegated by the stockholders to the directors. In general by-laws must be adopted in conformity to the charter and be reasonable and proper.[5]

The by-laws of a private corporation will be interpreted by the courts as interpreted by the corporation.[6]

The reasonableness of a by-law is a question of law and not of fact.[7]

In drawing by-laws the following rules should govern: they should be made certain;[8] they must be directed to all within the sphere of their operation;[9] they must operate equally upon all to whom applied;[10] they must be lawful as against members possessing rights, and must be reasonable.[11]

Sometimes the statute requires by-laws to be adopted within thirty days after incorporation and copied into a book of by-laws.[12] Such statutes are clearly directory and not mandatory.

§ 90. **Election of Directors.** — The power to choose a board of

[1] Carroll *v.* Bank, 8 Mo. Ap. 253.

[2] *In re* Klaus, 67 Wis. 40; 29 N. W. 582; People *v.* Company, 82 Ill. 457; S. S. Ass'n *v.* Company, 25 Mo. Ap. 642.

[3] *In re* Klaus, 67 Wis. 40; 29 N. W. 582; Mitchell *v.* Company, 40 N. Y. Sup. Court, 413.

[4] M. G. R. Company *v.* Wysong, 51 Ind. 12.

[5] See Kent *v.* Company, 78 N. Y. 182; Bergman *v.* Association, 29 Minn. 275; 13 N. W. 120; Commons *v.* Company, 12 Pa. St. 318; People *v.* Chicago Board of Trade, 45 Ill. 118.

[6] State *ex rel.* Attorney-General *v.* Conklin, 33 Wis. 21.

[7] State *v.* Overton, 4 Zabriskie (N. J.), 435.

[8] Goddard *v.* Merchants' Exchange, 9 Mo. Ap. 290.

[9] *Ex parte* Frank, 52 Cal. 606.

[10] People *v.* Society, 25 Barb. (N. Y.) 7.

[11] Com. *v.* Worcester, 3 Pick. 461; King *v.* Union, 170 Ill. 135; 48 N. E. 677. On failure to post by-laws, see Langon *v.* Company, 49 Ia. 317.

[12] See Hall *v.* Crandall, 29 Cal. 567; Clapman *v.* Doray, 89 Cal. 52; 26 Pac. 605.

directors is inherent in all private corporations irrespective of statute.[1]

The election of directors in connection with the organization of a corporation ordinarily follows the adoption of by-laws. After the organization the election of directors is usually had at the annual meeting of the corporation. In giving the notice of such annual meeting it is customary to specify in the notice that a board of directors is to be chosen.[2]

In choosing the directors it is incumbent upon the incorporators or stockholders, as the case may be, to observe the provisions of the statutes relative to the number of directors to be chosen and their qualifications as to stock-holdings, residence, and citizenship if any such are prescribed by statute. In the absence of such statutes as exist in many of the States authorizing the dividing of directors into classes, so that only a certain portion of the board are elected annually, the full board must be elected each year. In the absence of statute making the ownership of stock a qualification for holding the office of director such ownership is not necessary.[3] Even where the statute requires that directors shall be stockholders, it is not necessary that they shall become such before their election if they become stockholders before entering upon the duties of their office.[4] In the election of directors by the incorporators it is sufficient in order to qualify him that a director be a subscriber for stock, though no certificate has in fact been issued.[5] Where ownership of stock is necessary to qualify one as a director, the prevailing rule seems to be that the moment a director ceases to be a stockholder, he ceases to be a director *de jure* (but not *de facto*) without proceedings having first been taken to remove him.[6]

Where a director is required to take an oath of office before entering upon the discharge of his duties, his failure to take such an oath will not prevent him from becoming a director *de facto*.[7] Any person who can be a business agent for another can, if possessed of statutory qualifications, become a director.[8] Ordinarily

[1] Hurlbut *v.* Marshall, 62 Wis. 590; 22 N. W. 852.

[2] Merritt *v.* Ferris, 22 Ill. 303.

[3] Wright *v.* Company, 117 Mass. 226.

[4] Greenough *v.* Company, 64 Fed. 22.

[5] McComb *v.* Association, 10 N. Y. Sup. 552; Beckett *v.* Houston, 32 Ind. 393.

[6] Dispatch Light Packet *v.* Company, 12 N. H. 205; Wright *v.* Company, 52 N. J. Eq. 352; Howe *v.* Scarborough (Ala.), 35 So. 113.

[7] Simpson *v.* Garland, 76 Me. 203.

[8] People *v.* Webster, 10 Wend. (N. Y.) 554.

it is not necessary that resignations of directors be accepted in order to become effective.[1]

Persons owning a majority of stock have a right to elect directors.[2] It is a fundamental principle in corporation law that a majority of stockholders shall control the policy and regulate the business affairs of the corporation, and to this each stockholder impliedly agrees when he acquires stock in the corporation.[3] However, in order to insure minority representation on the board, cumulative voting for directors is permitted in a large number of the States.[4] Where such right to cumulate votes is mandatory such right cannot be taken away by by-law.[5]

The fact that a corporation begins business with an insufficient number of directors does not invalidate debts contracted by them, nor deprive it of its corporate rights and privileges unless some action is taken by the State to that end.[6] Failure to elect a board of directors annually does not work dissolution. The old board will hold over by implication of law.[7] This is a rule not only established by statute in a large number of the States, but is a well established rule of corporation law in the absence of such statutes.[8] In the election of directors a majority vote of all present is sufficient, provided a majority of the stock is represented at the meeting.[9] Vacancies in the board of directors cannot be filled by the remaining directors, but must be filled by the stockholders, unless such power is expressly granted by statute.[10] Even where the right to fill vacancies is given to the remaining directors it is probably true that there must be present at the meeting a majority of the whole number of directors prescribed by the charter, and that such vacancy be filled by a majority vote thereof.[11]

Unless regulated by statute or by-laws, the board of directors may fix any place within the domiciliary State at which annual

[1] Pres., etc. of Manhattan Co. *v.* Kaldenberg, 165 N. Y. 1; 58 N. E. 790; Briggs *v.* Spaulding, 141 U. S. 155.

[2] Faulds *v.* Yates, 57 Ill. 416.

[3] Wheeler *v.* Company, 143 Ill. 197; 32 N. E. 420.

[4] See Part III. Table 9, page 579.

[5] Tomlin *v.* Bank, 52 Mo. Ap. 430; Wright *v.* Company, 67 Cal. 532; 8 Pac. 70.

[6] Fargason *v.* Company, 78 Miss. 65; 27 So. 877.

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[8] Chamberlain *v.* D. S. Works, 103 Mich. 124; 61 N. W. 532; Moses *v.* Tompkins, 84 Ala. 613; 4 So. 763.

[9] Eggleston *v.* Doolittle, 33 Conn. 402.

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meetings for the election of directors may be held.[1] Where there are mandatory provisions in the charter, statute, or by-laws as to place of holding annual meetings these must be followed.[2] Where the certificate of incorporation is required to fix the number of directors, such number cannot be changed except by amendment thereof.[3]

In connection with the general subject of election of directors the question not infrequently arises as to the validity of the so-called "voting trusts" now becoming so common in this country. The prevailing and it is believed the true rule on this subject is set forth in Clowes *v.* Miller,[4] where it was held that in the absence of any improper motive such trusts are valid.[5] It is, in the absence of such improper motives, merely a convenient method of voting by proxy.

In the absence of statute, charter provision, or valid by-law to the contrary, holders of preferred stock have the same rights in the election of directors as belong to the holders of common stock.[6] It has been held that stockholders may in voting for directors change their vote while the election is in progress.[7] Mandamus is the proper remedy to compel canvassing of votes at election of directors to determine whether or not such election was valid.[8]

In some of the States there are certain statutory officers known as "Inspectors of Election," who must be chosen preliminary to the election of the board of directors. These inspectors should be chosen in the mode provided in the by-laws.[9] Inspectors have no power, express or implied, to pass upon the eligibility of directors.[10] The failure to have the inspectors sworn before acting as such will not invalidate an election.[11] In the absence of statutory provision

[1] Corbett *v.* Woodward, 5 Saw. 403; Commonwealth *v.* Smith, 45 Pa. St. 59; Pratt *v.* Company, 35 Conn. 365; Duke *v.* Taylor, 37 Fla. 64; 19 Sou. 172; Hilles *v.* Parish, 14 N. J. Eq. 380; Arms *v.* Conant, 36 Vt. 744; Hodgson *v.* Company, 46 Minn. 454; 49 N. W. 197.

[2] McDaniel *v.* Company, 22 Vt. 274.

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[4] 60 N. J. Eq. 179; 47 Atl. 345.

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[6] Mackintosh *v.* R. R. Co., 32 Fed. 350; 54 Fed. 582; Lockhart *v.* Van Alstyne, 31 Mich. 76; Miller *v.* Ratterman, 47 O. St. 141; 24 N. E. 496.

[7] State *v.* McGains, 64 Mo. Ap. 225.

[8] State *v.* McGains, 64 Mo. Ap. 225.

[9] *In re* Excelsior Fire Ins. Co., 16 Abb. Pr. 8; People *v.* Company, 55 Barb. 344; *In re* Lighthall Mfg. Co., 47 Hun, 258; State *v.* Merchant, 37 O. St. 251; Commonwealth *v.* Woelper, 3 S. & R. (Pa.) 29.

[10] *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

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[3] See Matter of Griffin Iron Co., 63 N. J. L. 168; 41 Atl. 931.

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[10] *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529.

[11] *In re* M. & H. Ry. Co., 19 Wend. (N. Y.) 135.

or regulation by by-laws providing otherwise, the power to appoint inspectors of election lies with the stockholders alone.[1]

§ 91. **Power to hold Meetings for the Election of Directors without the Domiciliary State.** — The general rule unquestionably is that in the absence of statute or unanimous consent of all the stockholders no election of directors by the stockholders can be legal, so as to make them directors *de jure*, when had at a meeting called without the limits of the State under whose laws the corporation is created.[2]

Twelve of the Commonwealths have statutes expressly authorizing the holding of stockholders' meetings without the domiciliary State.[3] In any event, it seems to be now well settled that where all the stockholders meet without the State and transact business thereat, even though such business be the annual election of directors, the stockholders present at such meeting are estopped to question the validity of the proceedings had thereat.[4] An excellent method of validating any action taken by stockholders at meetings held without the domiciliary State is to have subsequent action taken by the stockholders at a meeting called within the State ratifying what has been previously done by them without the State. This, it has been held, cures all previous defects.[5]

§ 92. **Voting by Proxy.** — At common law, voting of stockholders at annual meetings or special meetings was required to be done in person.[6] In the absence of statute, charter provision, or valid by-law giving stockholders this right, the same rule would apply at the present day.[7]

[1] State *v.* Merchant, 37 O. St. 251.

[2] Harding *v.* American Glucose Co., 182 Ill. 551; 55 N. E. 577. See Hodgson *v.* Company, 46 Minn. 454; 49 N. W. 197; Freeman *v.* Company, 38 Me. 343; Smith *v.* Silver Valley Min. Co., 64 Md. 85; 20 Atl. 1032; Aspinwall *et al. v.* Ohio & M. R. R. Co., 20 Ind. 492; W. H. & H. Mining Co. *v.* King, 45 Ga. 34; Hiles *v.* Parrish, 24 N. J. Eq. 380; Arms *v.* Connant, 36 Vt. 750; Bellows *v.* Todd, 39 Iowa, 209; Franco-Texas Land Co. *v.* Laigle, 59 Tex. 339; Mack *v.* De Bardelben, etc. Co., 90 Ala. 396; 8 So. 150; Duke *v.* Taylor, 37 Fla. 64; 19 So. 172; Camp *v.* Byrne, 41 Mo. 525; Mitchell *v.* Vt. Copper Min. Co., 40 N. Y. Sup. Ct. 406; Galveston, etc. Ry. Co. *v.* Cowdrey, 11 Wall. 459; 20 Law Ed. 199. The principle of estoppel may be applied here. Handley *v.* Stutz, 139 U. S. 417; 11 Sup. Ct. 530.

[3] See Part III. Table 11, page 581.

[4] T. M. Co. *v.* Goodhue, 18 N. Car. 981; Handley *v.* Stutz, 139 U. S. 417; 11 Sup. Ct. 530.

[5] G. I. & E. Co. *v.* Toler, 80 Md. 278; 30 Atl. 657.

[6] Perry *v.* Company, 93 Ala. 364; 9 So. Rep. 217.

[7] Phillips *v.* Wickham, 1 Paige (N. Y.), 590; Taylor *v.* Griswold, 14 N. J. L. 222; P. H. S. Bank *v.* Superior Court, 104 Cal. 649; 38 Pac. 452; State *v.* Tudor, 5 Day, 329; People *v.* Crossley, 69 Ill. 195; Perry *v.* Company, 93 Ala. 364; 9 So. 217.

Owing to the unquestioned right of a corporation to adopt a valid by-law permitting voting by proxy, even in the absence of a statute authorizing it, the question has ceased to be one of any great practical importance in the country to-day. Besides this, statutes exist in all of the States and Territories, except Arizona and Georgia, expressly authorizing the voting of stock by proxy. It should be observed, however, that where the right to vote by proxy is given by statute without restriction it cannot be qualified by by-law.[1]

Proxies may be issued in blank and lawfully filled in by the holder.[2] It has been held that stockholders cannot give an irrevocable proxy to secure the payment of a debt.[3] It is against the settled rules governing the control of corporations that an irrevocable power of attorney which directs the vote on stock, should be vested in a person who has no interest in the stock or is not a representative of a person interested therein.[4]

The foregoing suggests the question as to whether or not voting trusts, so common at the present time, are valid. A "voting trust" may be defined to be an agreement of stockholders to give any designated trustee the right to vote at his discretion through stockholders for a given period of time. It may be said that such voting trust is valid where neither the purposes nor the means used contravene any constitutional or statutory provision or well-recognized principles of public policy, and are within the scope of the powers of the contracting parties.[5]

§ 93. **First Directors' Meeting.** — The principal business to be transacted at the first meeting of the board of directors of a corporation is (1) the election of the officers provided for in the by-laws; (2) the carrying into effect the resolutions passed at the organization meeting of the stockholders, if any, looking to the payment of the stock in property, or, in lieu thereof, the

[1] Bank *v.* Superior Court, 104 Cal. 649; 38 Pac. 452.

[2] Matter of White, 45 Hun, 580; Matter of Townsend, 46 N. Y. St. Rep. 135.

[3] Matter of Germicide Co., 65 Hun, 606; 20 N. Y. Sup. 495.

[4] Clowes *v.* Miller, 60 N. J. Eq. 179; 47 Atl. 345.

[5] M. & O. R. *v.* Nichols, 98 Ala. 92; 12 So. 723; Smith *v.* Company, 115 Cal. 584; Kreisel *v.* Distilling Co., 61 N. J. Eq. 5; 47 Atl. 471; Brightman *v.* Bates, 175 Mass. 105; 55 N. E. 809; Moses *v.* Scott, 84 Ala. 608; 4 So. 742; Clowes *v.* Miller, 60 N. J. Eq. 179; 47 Atl. 345; Sullivan *v.* Parkes (N. Y.), 69 Ap. Div. 221; 74 N. Y. Sup. 786; Freon *v.* Company, 42 O. St. 30. See however Shepaug Voting Trust Case, 60 Conn. 553; 24 Atl. 32; Harvey *v.* Company, 118 N. C. 693; 24 S. E. 489.

passage of a resolution by the board of directors ordering an assessment, either in whole or in part, upon the par value of the capital stock. The general rule appears to be that unless the governing statute or a by-law of the corporation expressly provides that directors' meetings should be held within the domiciliary State, that such meetings may be held without the limits of such State if desired.[1]

Some courts, however, apparently distinguish in this regard between meetings of the board of directors for the election of officers and those meetings merely called for the transaction of routine business. Such courts hold that meetings of the first class must be held within the domiciliary State, while the others may be held without such State if desired.[2] In nearly half of the States statutes exist authorizing the holding of directors' meetings without the State.[3] It is unquestionably true that where incorporators can perform constituent acts outside of the domiciliary State directors can elect officers in like manner.[4]

When calling the directors together for their first meeting, the mode of notice provided for in the by-laws must be given. In the absence thereof personal notice must be given, or a waiver of notice must be had from each of the directors.[5] It is hardly necessary to state in this connection that no director can lawfully delegate power to act for him to another person.[6]

At common law a majority of the directors present and voting at a meeting was necessary to constitute a quorum of the full board.[7] In some few of the States, notably Oregon, statutory provisions exist permitting less than a majority of the board of directors to constitute a quorum. Provisions in statutes and by-laws requiring the election of directors to be held on a specified date are ordinarily construed to be merely directory.[8] The general rule is that a majority of the directors constitute a quorum

[1] Thompson *v.* Company, 58 Miss. 423; Lead Co. *v.* Reinhard, 114 Mo. 218; 21 S. W. 488; Bassett *v.* Mining Co., 15 Nev. 293; Parsons *v.* Lent, 34 N. J. Eq. 67; Hanna *v.* Company, 23 O. St. 622.

[2] Smith *v.* Mining Co., 64 Md. 85; 20 Atl. 1032; G. I. & E. Co. *v.* Toler, 80 Md. 278; 30 Atl. 651.

[3] See Part III. Table 12, page 582.

[4] Ohio, etc. R. R. Co. *v.* McPherson, 35 Mo. 13.

[5] Bank *v.* McCarthy, 55 Ark. 473; 18 S. W. 759; B. B. R. Co. *v.* Buck, 68 Me. 81; Library *v.* Association, 173 Pa. St. 30; 33 Atl. 744.

[6] Perry *v.* Company, 93 Ala. 364; 9 So. 217; Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 661; 14 N. Y. Sup. 16.

[7] Blackwell *v.* State, 36 Ark. 178.

[8] Beardsley *v.* Johnson, 121 N. Y. 224; 24 N. E. 380.

for the transaction of business, and a majority of the quorum have power to bind the corporation by their votes.[1]

§ 94. **Election of Corporate Officers.** — In nearly all of the States statutes exist designating certain officers that business corporations must have, and providing that such officers shall be elected by the board of directors duly convened for that purpose. Where, however, as is sometimes the case, this power is devolved upon the stockholders by statute, then directors have no power to elect such officers.[2] In the absence of such statutes as are here referred to, giving the directors power to elect officers, it must be admitted that the current of authority is to the effect that the power then lies in the stockholders alone.[3]

The law implies that directors shall hold their office until their successors have been elected and qualified.[4] Where vacancies occur in the board of directors they must be filled, in the absence of statute, charter provision, or by-law giving the power to the directors, by the stockholders only, and even where the power to fill vacancies is lawfully bestowed upon the remaining directors, vacancies can then be filled only by action of a majority of the authorized number of directors.[5]

Questions of policy, or management, or expediency of contract or action, or consideration of gross misappropriation or unlawful appropriation of corporate funds to the detriment of corporate interests, are left generally to the decision of the directors if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in place of those determined on by the scheme of incorporation.[6]

§ 95. **Appointment of Executive Committee.** — The incorporation acts of Connecticut, Delaware, Massachusetts, Nevada, New Jersey, North Carolina, Virginia, and West Virginia all authorize the appointment by the board of directors from their own number of an executive committee to whom may be entrusted most of the ordinary duties that devolve upon the full board of directors.

[1] Ten Eyck *v.* Company, 74 Mich. 226; 41 N. W. 905; see also Hoyt *v.* Thompson, 19 N. Y. 207.

[2] See *In re* St. Helen Mill Co., 13 Saw. 92; Walsenberg Water Co. *v.* Moore, 5 Col. App. 144; 38 Pac. 60.

[3] Beardsley *v.* Johnson, 121 N. Y. 224; 24 N. E. 380; *In re* A. A. G. Iron Co., 63 N. J. Law, 168, 357; 41 Atl. 931; 46 Atl. 1097.

[4] People *v.* Runkle, 9 Johnson (N. Y.), 147; Huguenot Nat. Bank *v.* Studwell, 6 Daly (N. Y.), 713.

[5] Moses *v.* Tompkins, 84 Ala. 613; 4 Sou. 763.

[6] Ellerman *v.* Ry. Co., 49 N. J. Eq. 217; 23 Atl. 287; Ulmer *v.* Company, 98 Me. 579; 57 Atl. 1001.

It was at one time held that the performance of any duties by the board of directors involving the exercise of discretion and judgment could not be so delegated.[1] The modern rule, even in the absence of statute, is that directors have the power to delegate to a part of their own number authority to perform any part of the ordinary business of the corporation, even though it involves the exercise of the broadest judgment and discretion.[2]

In any event, whenever a question is raised as to the validity of acts done by an executive committee, the ratification of their action by the full board will undoubtedly correct all defects in the act complained of which would have been valid in the first instance if performed by the board itself.[3]

§ 96. **Stock Assessments.** — Where the capital stock of a corporation is not all issued in the first instance in exchange for property, it is customary for the board of directors to pass a resolution at their first meeting, making an assessment upon the stock of stockholders either for its entire par value or some fractional part thereof. Generally speaking, in order to sustain a right of action on stock subscriptions, it is necessary to show that a valid call or assessment has been made.[4] An assessment is a rating or fixing of the proportion by the board of directors or by the stockholders, which every subscriber is to pay of his subscription, of which notice is given, which notice is referred to as a "call."[5]

While it is doubtless true that a "call" may be made either by the directors or the stockholders, nevertheless it is usually made by the directors. This of course necessitates the organization of the corporation as a preliminary to the making of a valid assessment.[6] The purpose of the "call" is to fix the time for payment where that is not provided for either by statute, charter provisions, or by-law.[7] The better rule seems to be that the

[1] Gillis *v.* Bailey, 21 N. H. 149.

[2] Hoyt *v.* Thompson, etc., 19 N. Y. 207; Burden *v.* Burden, 159 N. Y. 187; 54 N. E. 17; Jones *v.* Williams, 139 Mo. 1; 40 S. W. 383; Davis *v.* Company, 2 Utah, 74; Tempel *v.* Dodge, 89 Texas, 69; 32 S. W. 514; 33 S. W. 222; Metropolitan Telephone Co. *v.* Company, 44 N. J. Eq. 568; 14 Atl. 907; Sheridan Electric Light Co. *v.* Bank, 127 N. Y. 517; 28 N. E. 467.

[3] U. P. Ry. Co. *v.* Company, 163 U. S. 564; 16 S. Ct. 1173.

[4] Chandler *v.* Siddle, 5 Fed. Cases No. 2594; 3 Dillon, 477.

[5] Spangler *v.* Company, 21 Ill. 276.

[6] Williams *v.* Taylor, 120 N. Y. 244; 24 N. E. 288; Williams *v.* Company, 153 Ind. 496; 55 N. E. 425.

[7] West *v.* Crawford, 80 Cal. 19; 21 Pac. 1123; W. S. Bank *v.* Bank, 107 Mo. 133; 17 S. W. 644; Champion Fire Kindler Co. *v.* Rischert, 74 Mo. Ap. 537.

directors have implied power by virtue of their office to make assessments.[1]

In any event, shareholders may delegate such power to the directors when the same is given to them by statute or by-law.[2] It is questionable, however, whether the directors have power in their turn to delegate the power of making assessments to some ministerial officer.[3] In the making of assessments the utmost care should be observed to see that all the statutory requirements relative to the same are complied with.

§ 97. **Certificates required to be made by Officers or Directors after Organization.** — In Maine, Massachusetts, Arkansas, and Indiana the statutes require that the board of directors together with certain of the corporate officers shall file a certificate of organization with certain officers. Ordinarily the failure to file such certificate would not affect the legal character of the corporation unless there was a statutory provision to that effect.[4] In Illinois, Missouri, Tennessee, and Utah a certificate of due organization is issued to the corporation by State officials.[5]

In New York, New Jersey, District of Columbia, Nevada, Indiana, Massachusetts, North Carolina, and Colorado the law requires that after the payment, either in whole or in part, of the capital stock a certificate shall be made and filed in the proper State office setting forth the facts relative to such payment.[6] In some of the States, notably New Jersey, failure to file such certificate renders the officers neglecting or refusing to make such certificate for thirty days after written request so to do, jointly and severally liable for all debts contracted before the filing of such certificate.[7]

Unless there is a penalty provided, such provisions are merely directory.[8]

[1] Budd *v.* Company, 15 Ore. 413; 15 Pac. 659; Smith *v.* Company, 1 How. (Miss.) 479.

[2] Rives *v.* Company, 30 Ala. 92.

[3] Pike *v.* Company, 68 Me. 445; S. H. Road *v.* Green, 12 R. I. 164.

[4] *In re* Shakopee, etc. Co., 37 Minn. 91; 33 N. W. 219; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; *In re* Philadelphia Artisans Institute, 8 Phila. 229; A. S. A. & G. Co. *v.* Whittier, 117 Mass. 451.

[5] See Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.), 251.

[6] Also in Delaware upon request of a creditor or stockholder.

[7] Nassau Bank *v.* Brown, 30 N. J. Eq. 478; Waters *v.* Quinby, 27 N. J. L. 296. See S. F. N. Bank *v.* Almy, 117 Mass. 476; Chase's Pat. El. Co. *v.* Company, 152 Mass. 428; 28 N. E. 300; Chase *v.* Lord, 77 N. Y. 1; Block *v.* Womer, 100 Ill. 328; Hardman *v.* Sage, 124 N. Y. 25; 26 N. E. 354; Flash *v.* Conn, 16 Fla. 428; Austin *v.* Berlin, 13 Col. 200; 22 Pac. 433.

[8] Veeder *v.* Undgett, 95 N. Y. 295

§ 98. **Time in which Corporation must organize and commence Business.** — Over half of the States have provisions upon their statute books requiring corporations to organize and commence business within from one to five years after the issuance of their charter.[1] Usually the penalty for failure to so organize and commence business is the right given to the State to bring proceedings for the forfeiture of the corporation's charter on the ground of non-user thereof during the statutory period. It is undoubtedly true, however, that as against all but the State failure to organize and commence business within the time limited by statute will not prevent it from becoming a corporation *de facto*.[2]

§ 99. **Stock Certificates.** — Stock certificates are the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member.[3] Subscribers to the capital stock upon complying with the terms of their subscription are entitled to certificates of stock showing the number of shares owned by them. These certificates must be signed by the officers designated for that purpose by statute or, in the absence of statutory provision, by such officers as are designated in the by-laws for that purpose.[4] A seal is not necessary to the validity of a corporation of stock in a corporation (although it is customary to affix one), and this, too, even in the presence of statutory requirements.[5] Neither is it necessary to the validity of a stock certificate that it should be issued in the State of the corporation's domicile.[6] Generally speaking, however, the stock certificate book, seal, and stock transfer books must be kept within the State unless the statute provides otherwise.[7]

Statutory provisions exist in nearly all the States providing the minimum and maximum par value of shares of capital stock.[8] In some few States the statute expressly provides that all the stock certificates issued by a corporation shall be of a uniform par value. Even in the absence of such a mandatory provision, it is at least

[1] See Part III. Table 11, page 581; see also People *v.* Ry. Co., 45 Cal. 306; Commonwealth *v.* Water Co., 110 Pa. St. 391; 2 Atl. 63.

[2] Lehman *v.* Warner, 61 Ala. 455; S. L. A. & T. H. Ry. Co. *v.* Company, 158 Ill. 390; 41 N. E. 916; County of Macon *v.* Shores, 97 U. S. 272.

[3] Mechanics Bank *v.* Company, 13 N. Y. 599.

[4] N. O. & T. P. Co. *v.* Bank (Ohio), 24 Wk. Law Bul. 198; Titus *v.* G. W. T. Road, 61 N. Y. 237.

[5] Fitzhugh *v.* Bank, 3 Monroe (Ky.), 128; Halsted *v.* Dodge, 1 How. Pr. (N. Y.) 170.

[6] Courtright *v.* Deeds, 37 Ia. 503.

[7] Perkins *v.* Lyons, 111 Ia. 192; 82 N. W. 486.

[8] See Part III. Table 6, page 576.

questionable whether the courts would sustain the issuance of stock certificates of more than one designated par value.[1] In the absence of statute prohibiting the same, corporations may insert in stock certificates such stipulations as they choose relative to the rights of the holders of such certificates, and these constitute valid contracts between the stockholders and the corporation.[2]

[1] See *In re* Cressona Building Ass'n, 1 Legal Register (Pa.), 177. As to meaning of par value, see Commonwealth *v.* Company, 129 (Pa.) St. 405; 18 Atl. 414; Delafield *v.* Illinois, 2 Hill (N. Y.), 172.

[2] Pioneer Co. *v.* Brockett, 58 Ill. Ap. 204.

CHAPTER IV.

ISSUANCE AND PAYMENT OF CAPITAL STOCK.

§ 100. **General Remarks as to the Issuance and Payment of Capital Stock upon the Organization of a Corporation.** — In connection with the issuance and payment of capital stock following the organization of a corporation, several important matters should be considered, such, for example, as the time within which the capital must be paid in; the question as to how the capital must be paid in with reference to whether in cash, in property, or in services; and, finally, consideration of the safest and most convenient method to be adopted by the corporation so that it can sell a portion of its capital stock at less than par, if necessary, for the procuring of working capital for the corporation; and this, too, without subjecting the purchasers of such stock to any liability to creditors for alleged unpaid stock subscriptions thereon.

It appears that in certain of the States, notably South Dakota and Tennessee, it is not necessary that any of the capital stock be either subscribed or paid in, in order that the corporation may transact business.[1] In the several States provisions of the several incorporation acts in force therein differ greatly in regard to the matter of the time within which capital stock must be paid in. New York requires that half of the authorized capital be paid in within one year; Missouri, fifty per cent thereof immediately; Maryland, one-fourth of the capital must be paid in each year; in Indiana, manufacturing corporations must pay in all their capital within eighteen months. Twenty of the States require a certain percentage of the capital to be paid in, in order to commence business; while in twenty-five a certain percentage of the authorized capital must be subscribed.[2] As a general rule the effect of the provisions of law here referred to when they are not complied with has been held not to affect the existence of a corporation as a corporation *de jure*, but merely afford ground for a

[1] See *ante*, § 2.

[2] See Part III. Table 6, page 576.

judgment of ouster in a proper action brought by the State for that purpose.[1]

Sometimes the statutes go further and require certificates as to the payment of the capital stock to be filed in designated offices.[2]

§ 101. **Manner of Payment of Capital Stock.** — Probably no subject of corporation law is more involved in apparently hopeless confusion than that growing out of the question of the payment of capital stock of corporations where the rights not only of stockholders, but creditors as well, are involved. Frequent attempts have been made from time to time by both State legislatures and the courts looking to the enactment or declaration of rules which will remove the question from its present vague and unsatisfactory form into the realm of certainty and security. It may not be without its practical value to trace here the sporadic development of the various doctrines that have been advanced from time to time relative to both how the capital stock of a corporation may be paid in, and when so paid in whether the valuation placed upon the property accepted by the corporation in exchange for stock, shall be conclusive alike upon stockholders and creditors. The common law rule with reference to the manner of payment of the capital stock of a corporation appears to have been from time immemorial that it must have been paid for either in money or money's worth.[3] In this country such a rule seems to have obtained at an early date. Even when required, by constitutional provision or statute, that stock should be paid for in cash, nevertheless the courts early adopted the view that the same might be paid for in money or money's worth. Otherwise it would simply put the corporation to the necessity of issuing stock in the first instance for money, and then ordering it to be immediately paid out for necessary labor, property, or services.[4]

The next step in order of development was the enactment of either constitutional or statutory provisions expressly authorizing

[1] Baker *v.* Backus, 32 Ill. 79; Fargason *v.* Company, 78 Miss. 65; 27 So. 877; Hammond *v.* Strauss, 53 Md. 1; People *v.* Chambers, 42 Cal. 201; People *v.* Bank, 7 Col. 226; 3 Pac. 214; Palmer *v.* Lawrence, 3 Sandf. N. Y. 161; Lake Ontario, etc. R. Co. *v.* Mason, 16 N. Y. 451; Spartenburg, etc. R. Co. *v.* Ezell, 14 S. C. 281; State *ex rel. v.* Webb, 97 Ala. 111; 12 So. 377.

[2] See Quinby *v.* Waters, 28 N. J. L. 533. See *ante*, sec. 97.

[3] Drummond's Case, L. R. 4 Chan. Ap. 772.

[4] Liebe *v.* Knapp, 79 Mo. 22; Camden *v.* Stuart, 144 U. S. 104; 12 S. Ct. 585; Kronert *v.* Johnston, 19 Wash. 96; 52 Pac. 605.

the payment of stock of corporations in money, property, or services. Later came a wave of constitutional enactments mainly confined to the Western States, to the effect "that no corporation should issue stock except for money, labor done, or property actually received, and declaring that all fictitious increase of stock should be void." In early times, when the number of corporations formed were few in number, and their charters limited to a few purposes, the courts were seldom called upon to determine whether or not capital stock had been actually paid in in accordance with law,— this for the reason that in most cases the mode of payment of such stock had been in cash. However, early in the nineteenth century the question became a vital one through the not infrequent attempts on the part of certain corporations to pay for their stock in property taken at a valuation which in the opinion of many was largely fictitious if not fraudulent. When such corporations became insolvent, creditors, and sometimes before that time stockholders, brought the question in its practical form before the courts as to whether such valuation were binding not only upon the corporation, but upon its creditors as well. It was such a case which led Justice Joseph Story in 1824 to give utterance to the famous "trust fund doctrine" to the effect that the capital stock of a corporation is to be regarded at all times as a fund held in trust by the corporation for the benefit of its creditors.[1]

In its practical application the trust fund doctrine was found to be an instrument of injustice rather than of justice. Besides this it had never received the sanction of the common law, as it existed in England before the Revolution, and had not in its last analysis any right to demand recognition on the broad basis laid down for it by its founder. By degrees the majority of the courts refused to recognize the trust fund doctrine, at least in its original form, and declared upon the only safe ground, which was that stockholders should only be held liable to creditors on stock issued in exchange for property, upon the ground of fraud.[2] At the same time the courts divided upon the question whether in the appraisal of property taken in exchange for capital stock corporations should be required to appraise such property at its true value without regard to the intention of the parties upon whom the duty of

[1] See Wood *v.* Dummer, 3 Mason, 308; Fed. Cases No. 17944.

[2] See opinion of Justice Wm. Mitchell in Hospes *v.* Company, 48 Minn. 174; 50 N. W. 1117.

making such appraisal was imposed, or whether they should treat all such appraisals as conclusive upon both the corporation and creditors when made in good faith and where no actual fraud appeared in the transaction. At this time, too, the courts almost universally decided to distinguish in this regard between the rights of the corporation and its stockholders on the one hand and the rights of creditors on the other. Such a distinction as is here referred to was evidenced by the adoption of the rule now recognized everywhere that a valuation placed upon stock by the corporation may be valid and binding upon the corporation and its stockholders and yet not conclusive as against creditors.[1]

The doctrine here referred to is well stated by Judge Showalter in a Federal case as follows:[2]

"Whatsoever may have been in fact the value of the property turned over to the company for its stock, the latter agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned in what was thus done. Neither any person thus holding stock nor any person who afterwards became a stockholder by assignment from one who then held stock can now make complaint on behalf of the corporation against the lawfulness of that transaction. This I take to be the settled law on that subject."

The next evolutionary step is to be found in the recognition by both the legislatures and courts of a number of the Commonwealths of the unsatisfactory results attending the application of not only the narrow and falsely conceived "true value rule" above referred to, but that of the "good faith rule" as well. It was clearly seen that something further was needed in order to remove the subject for all time from its situation of uncertainty and doubt. Both the legislatures and the courts of these Commonwealths undertook to remedy the matter, with what success it will hereafter appear. Certain of the States, such as New Jersey, New York, Delaware, West Virginia, Connecticut, and others, enacted statutes providing in substance that in those cases where corporations attempted to issue their capital stock as fully paid in exchange for property,

[1] Handley *v.* Stutz, 139 U. S. 417; 35 L. E. 227; Scovill *v.* Thayer, 105 U. S. 143; 26 L. E. 968; Barr *v.* Company, 125 N. Y. 263; 26 N. E. 145; Parmalee *v.* Price, 208 Ill. 544; 70 N. E. 725.

[2] Northern Trust Co. *v.* Company, 75 Fed. 936.

the valuations placed upon such property by the board of directors thereof should, in the absence of actual fraud or gross overvaluation, be conclusive in the premises. Again, other States sought to remedy the evil in a surer, if less generally satisfactory form. Thus, for example, Michigan, Virginia, Florida, and other States have acts upon their statute books requiring a description of the property which they desire to accept in exchange for their capital stock to be submitted to State officials in order that the valuation placed upon such property by the corporation may be approved by such State officials before the stock can be issued; the act further generally providing that after such appraisal has been approved by the State officials, it should be conclusive in the premises.

Turning now to the efforts of the court on their part to remedy the evil above referred to, the following may be said. Without in terms adopting what is hereinafter referred to as the "speculative value rule" the courts in recent years have often recognized, in connection with attempts on the part of corporations to issue stock as full paid in exchange for property, the distinction that clearly obtains between property which has either a well-known or easily ascertained market value and that other species of property of the character commonly known as "speculative," which without any present large intrinsic value, possesses nevertheless in almost every instance a large value for future speculative purposes, not determinable, however, by the ordinary market value standards. Such a rule, when generally recognized, will have the effect in law of practically dividing corporations into two great classes with respect to the question of issuing stock thereof in exchange for property, to wit, non-speculative and speculative corporations.

On the subject now before us certain portions of the able report of the Massachusetts legislative committee on corporations rendered in 1903, is so peculiarly instructive and appropriate that we venture to quote the following extract therefrom:

"The history of corporations, as well as the logic of the case, shows that there are possible two general theories as to the State's duty in creating corporations: first, the old theory that, being creatures of the State, they should be guaranteed by it to the public in all particulars of responsibility and management; and the modern quite opposite theory that, in the absence of fraud in its organization

or government, an ordinary business corporation should be allowed to do anything that an individual may do. Under the old theory, the capital stock of a corporation was, in the law, considered to be a guarantee fund for the payment of creditors, as well as affording a method of conveniently measuring the interests of the individual owners of a corporate enterprise. There resulted from this principle not only the fundamental proposition that the capital stock, being in the nature of a guarantee fund, should be paid up at its full par in actual cash, but all the other provisions to protect creditors or other persons having dealings with the corporation: such as, that the debts of a corporation should not exceed its capital stock, designed primarily in the interest of creditors and secondarily in that of the stockholders, who were looked after as carefully as if they were the wards of the State when dealing in corporation matters. Under the modern theory the State owes no duty to persons who may choose to deal with corporations, to look after the solvency of such artificial bodies; nor to stockholders, to protect them from the consequences of going into such concerns, the idea being that in the case of ordinary business corporations the State's duty ends in providing clearly that creditors and stockholders shall at all times be precisely informed of all the facts attending both the organization and the management of such corporations, and particularly that there should be full publicity given to all details of the original organization thereof.

"The committee has had little hesitation in determining which of these theories it should adopt. The limit of capitalization both in amount and in valuation to the net tangible assets of the corporation has unquestionably had much to do with the arrest of corporate growth in this Commonwealth. Good-will, trade-marks, patents may unquestionably be valuable assets, which, under our present method, may not be capitalized. Admirable as this theory may have been, of payment of capital stock in full in cash, the condition is so easily avoided in practice that the result is that our existing law promises a protection which, in reality, it does not afford, and is merely an embarrassment to those who feel obliged to comply not only with the letter but with the spirit of the law. It is no longer true that persons dealing with corporations rely upon the State laws to guarantee their solvency or their proper management. The attempts of the Commonwealth to do so by laws still remaining on its statute books result, as we apprehend, only in a false sense of security; and we believe that the act proposed, while giving up the attempt to do the impossible thing, will really, by its greater attention to the details of organization required to be made public by all corporations, result in an advantage to stockholders and creditors more substantial than the

present partial attempt to enforce a principle impossible of complete realization and which is, under existing laws, easily evaded.

"It is impossible to reconcile or combine the two systems. Either the old theory must be maintained, under which the State attempts though vainly to guarantee both to stockholders and creditors that there is one hundred dollars of actual value behind each one hundred dollars of par value of capital stock, or some other system must be adopted which, while not being chargeable with the vagueness and laxity of the newer legislation of other States, will permit a share of capital stock, although nominally one hundred dollars in value, to represent, as the word implies, only a certain share or proportion, which may be more or less than par, of whatever net assets the corporation may prove to have. Under a system of this sort the State machinery will only provide that the stockholders and, perhaps, the creditors, may at all times have access to the corporation records or returns in such manner as clearly to show, both at organization and thereafter, all of the property or assets of which such share of capital stock actually represents its proportion of ownership.

"The question of monopoly the committee does not conceive to have been left to its consideration. The limitations now existing on the capitalization of business corporations are, no doubt, attributable to the sentiment which has always existed against monopoly, but it is clearly the policy of the Commonwealth, as shown in its recent legislation, to do away with the attempt to prevent large corporations, simply because they are large. Moreover, it is apprehended that the question of monopoly, or rather of the abuse of the power of large corporations, does not result necessarily from the size of corporations engaged in business throughout the United States. In the opinion of the committee, some confusion has been created, in the discussion of the form of so-called trust legislation, by a failure to appreciate that its real object is not to protect the investor, who can or should learn to take care of himself, or the creditor who has already learned to do so. The real purpose of such legislation is the protection of the consumer. In other words, there is no reason for an arbitrary limitation of capitalization unless it can be used as a means of creating a monopoly which will influence the price of commodities. In the opinion of the committee, the question of capitalization is not a contributing factor in the fight for a monopoly. The United States Steel Company would have no greater and no less a monopoly of the steel business if it were organized with one-half of its present capitalization. The Standard Oil Company has a very conservative capitalization, and yet it is the most complete monopoly of any industrial corporation in this country.

"At all events, it is no better for the State to leave its citizens at the mercy of the large corporations created by other less careful sovereignties, than to permit the organization of corporations adequate to the demands of modern business under its own laws, subject to its own more careful regulation and control. Under our State and Federal system it is practically impossible for any one State, by its own laws, to control foreign corporations, but so far as possible at present the committee has sought to subject them to the same safeguards of reasonable publicity and accurate returns, both as to organization and annual condition, as the State requires of its own corporations. The simple requirement of an annual excise tax, based on the capitalization of such foreign corporations, will serve to bring them under the control of this State, and the way will be open for their further regulation if desirable. This annual tax has been levied upon the same principle as the corresponding tax paid by home corporations. The State should impose no greater burden on foreign corporations than on its own, but should, so far as possible, subject them to its own laws.

"The committee would repeat its opinion that, so far as purely business corporations are concerned, and excluding insurance, financial, and public service corporations, the State cannot assume to act, directly or indirectly, as guarantor or sponsor for any organization under corporate form. It can and should require, for itself and for the use of all persons interested in the corporation, the fullest and most detailed information, consistent with practical business methods, as to the details of its organization, the powers and restrictions imposed upon its stockholders, and as to the property against which stock is to be or has been issued.

"Capital stock may be paid for in cash or by property. If it is paid for in cash, it may be paid for in full or by instalments, and a machinery has been created for protecting the corporation against the failure of the subscribers to stock to pay the balance of their subscriptions. If stock is paid for by property, the incorporators and not the State are to pass upon its value. Before any stock, however, can be issued for property, a description of the property sufficient for purposes of identification, to the satisfaction of the Commissioner of Corporations, must be filed in the office of the Secretary of the Commonwealth. This document becomes a public record, and may be consulted by any one interested in the corporation. If the officers of a corporation make a return which is false and which is known to be false, they are liable to any one injured for actual damages. If a full and honest description is made of property against which stock is issued, a stockholder cannot complain because of his failure to inform

himself by personal examination or investigation of the value of the property in which he is, or contemplates becoming, an investor.

"The second principle upon which the committee has acted in its specific recommendations is this: that the State should permit the utmost freedom of self-regulation if it provides quick and effective machinery for the punishment of fraud, and gives to each stockholder the right to obtain the fullest information in regard to his own rights and privileges before and after he becomes the owner of stock."

§ 102. **Payment of Capital Stock in Services.** — The statutes of Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Kentucky, Maine, Missouri, Montana, North Dakota, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin expressly authorize the payment of stock in services. It sometimes becomes a question of importance to know just what is meant by "services" as used in this connection.[1] Frequently attempts are made to issue stock to persons gratuitously for the use of their name in the promotion of the corporation under the theory that permission to use their name is a proper service rendered to the company, against which stock may be issued. The current of authority seems to be against this proposition.[2]

Still again, the constitutional provision which exists in many of the States declaring all fictitious increase of stock void militates against such lines of procedure.[3]

Oftentimes an attempt is made to issue stock to promoters of corporations under what is known as "promotion stock." The promoters are usually the incorporators, and as such are not entitled to gifts of stock.[4] However, if in the promotion of the company services and time have been employed, the same may be recompensed to the extent of the just value of such services.

§ 103. **Payment of Capital Stock in Property.** — In most of the Commonwealths statutes exist expressly authorizing the payment of capital stock of a corporation in property.[5] Even in the absence

[1] See Arapahoe, etc. Co. *v.* Stevens, 13 Col. 534; 22 Pac. 823; Clevenger *v.* Moore (N. J.), 58 Atl. 88.

[2] P. S. Bank *v.* Company, 105 Mich. 535; 63 N. W. 514; Christensen *v.* Eno, 106 N. Y. 97; 12 N. E. 648; Handley *v.* Stutz, 139 U. S. 417; 35 Law Ed. 227; Fogg *v.* Blair, 139 U. S. 118; 35 Law Ed. 104.

[3] See Hellerman *v.* Maier, 116 Cal. 416; 48 Pac. 377.

[4] Brown *v.* F. S. H. Co., 119 Fed. 472.

[5] See Part III. Table 10, page 580.

of such statute stock may doubtless be issued in the same manner, provided the purchase of such property is within the express or implied powers conferred by the charter and the property is of such a character as to be suitable for the specific purpose for which the corporation was formed.[1] Some few of the States describe in considerable detail just what kinds or classes of property may be accepted by the corporation in exchange for its capital stock. The incorporation acts of Alabama, North Carolina, Virginia, West Virginia, and New Jersey are particularly full in this regard. In the absence of such provisions corporations under the restrictions stated above may accept in payment of their capital stock all kinds of real and personal property having some monetary value, such as mining lands, gas lands, patent rights, secret formulæ, trade-marks, and the good will of an established business.[2]

The payment of capital stock may be made in notes, bonds, or mortgages in the absence of any statutory or charter prohibition.[3] But as to creditors, if the notes, bonds, or mortgages should turn out to be worthless, the parties accepting such stock might be compelled to pay the par value of such stock in money.[4] So it has been held that stock of a corporation may be paid for in advertising,[5] in a license to take minerals from lands,[6] and in stock in other corporations.[7]

In other words, capital stock of a corporation may be issued against any property which the corporation is authorized to purchase, or which is necessary for its legitimate business.[8]

One of the most frequent questions with which an attorney has to deal in connection with the organization of a corporation has reference to devising some safe method whereby stock may be legally issued in the first instance as full paid and non-assessable, to be thereafter sold below par if necessary for the purpose of procuring a working capital for the company. The main thing

[1] Liebke *v.* Knapp, 79 Mo. 22.

[2] Loud *v.* Company, 153 U. S. 564; 141 S. Ct. 928; Carr *v.* La Fevre, 27 Pa. 417; American Tube & Iron Co. *v.* Company, 165 Pa. St. 489; 30 Atl. 940; Young *v.* Company, 65 Mich. 111; 31 N. W. 814; Washburn *v.* Company, 81 Fed. 17; Whitehill *v.* Jacobs, 75 Wis. 474; 44 N. W. 630; Bank *v.* Company, 32 W. Va. 37; 59 S. E. 243; Kelly *v.* Clark, 21 Mont. 319; 53 Pac. 959.

[3] Goodrich *v.* Reynolds, 31 Ill. 490; Stoddard *v.* Company, 44 Conn. 545.

[4] Bouton *v.* Denent, 123 Ill. 142; 14 N. E. 62.

[5] Liebke *v.* Knapp, 79 Mo. 22.

[6] Shepard *v.* Drake, 61 Mo. Ap. 134.

[7] East N. Y. J. R. Co. *v.* Lighthall, 36 How. Pr. 481.

[8] Bruner *v.* Brown, 139 Ind. 600; 38 N. E. 318.

to be kept in mind in connection with the foregoing is to see that the stock is so issued that future purchasers thereof shall not be liable thereon either to the corporation or to creditors. This can be accomplished most satisfactorily in the following manner.

Have the corporation accept the proposition to issue its capital stock, either in whole or in part, against real or personal property to be thereafter duly conveyed or transferred to the corporation. Next the property so conveyed or transferred should be appraised at a valuation which will stand the test according to the character of the property so conveyed or transferred of either the good faith or the speculative value rules already referred to. The next step is for the party to whom such stock is issued to transfer such stock, either in whole or in part, back to the corporation under a trust agreement providing that the same shall be sold at such times and at such prices as to the board of directors of the corporation will seem advisable for the purpose of procuring the necessary working capital. Under such circumstances the stock so transferred, while originally issued at par, may be sold at the best price obtainable, and the purchasers will not incur liability beyond the agreed price even to subsequent creditors.[1] The same is true of stock that has been forfeited for non-payment of assessments.[2]

§ 104. **Statement of True Value Rule.** — In connection with the appraisal of property taken by a corporation in exchange for its capital stock, the courts have established various rules with a view to laying down some satisfactory principle upon which such appraisal may be based in those cases where creditors seek to enforce as against the holders of such stock an alleged liability for unpaid stock subscriptions. The various rules here referred to may be enumerated as follows: "the true value rule," "the good faith rule," and "the speculative value rule." It is to the first of these that our attention will now be directed.

What is known as "the true value rule" is a natural outgrowth of the adoption by many of the courts of the trust fund doctrine enunciated by Judge Story in Wood *v.* Dummer.[3] This may be

[1] Iron Co. *et al. v.* Hayes *et al.*, 165 Pa. St. 489; 30 Atl. 936; Lake Sup. Iron Co. *v.* Drexel, 90 N. Y. 87; Davis Bros. *v.* Company, 101 Ala. 127; 8 So. 496; Alling *v.* Wenzel, 133 Ill. 264; 24 N. E. 551; M. & L. R. Ry. Co. *v.* Dow, 120 U. S. 287; 7 S. Ct. 482; Coleman *v.* Howe, 154 Ill. 458; 39 N. E. 725; Kimball *v.* Company, 69 N. H. 485; 45 Atl. 253.

[2] Pullman *v.* Company, 73 Ill. Ap. 313; Otter *v.* Company, 50 Barb. 247.

[3] 3 Mason, 308; Fed. Cases, No. 17944.

stated as follows: That the courts will not treat anything in the shape of property accepted by the corporation in exchange for its capital stock as payment thereof except to the extent of the true value of the property received, wholly without regard to the presence of fraud or the absence of good faith in the transaction.[1]

Not only has the true value rule been adopted by many courts, irrespective of statute, but it has found legislative recognition as well. Thus the incorporation act of Alaska requires that such property shall be assessed at its true money value; that of Connecticut and Delaware, at its actual value; in Kentucky, at its market price; in North Dakota and South Carolina, at its true money value; in Tennessee and Utah, at its fair cash value, and Florida, at a just valuation. In Connecticut, Massachusetts, and North Dakota the necessity of making such appraisal according to the strict letter of the statute is very forcibly suggested by making the directors liable to all parties injured thereby in case they fail to make such appraisal as directed by the act. Statutory provisions which exist in so many of the States declaring all fictitious increase of stock void have been held by the courts not to make the validity of an over-issue of stock dependent upon the inquiry whether the money or property received therefor was of equal value in the market with the stock so issued, or to restrict private corporations acting without the approval of their stockholders in the sale of their stock for money, property, or labor done upon such terms as they might deem proper, provided always that the transaction is a real one, based upon present consideration, having reference to legitimate corporate purposes, and is not merely a device to evade the law and accomplish that which is forbidden.[2]

§ 105. **Statement of Good Faith Rule.** — As has already been observed in a previous section,[3] the trust fund theory of Justice Story no longer obtains in a majority of the States. With the absence of any general recognition by the courts of this doctrine, there necessarily followed the abrogation of the true value rule, which was based largely upon the trust fund doctrine. In its place has appeared in many jurisdictions what is known as the "good faith rule." The true value rule in its practical application was harsh and unconscionable, was wholly in the interest of

[1] Shickle *v.* Watts, 94 Mo. 410; 7 S. W. 274; Smith *v.* Company, 115 Cal. 584; 47 Pac. 582; M. & L. R. Ry. Co. *v.* Dow, 120 U. S. 287; 7 S. Ct. 482.

[2] *Ante*, § 101.

creditors, and made little account of the interests of equally innocent stockholders. The good faith rule, on the other hand, while often difficult of practical application, is much more liberal and fair to all concerned than the rule which it is now so rapidly supplanting. It may be stated as follows:

That where the governing statute authorizes the shares to be paid for in property instead of cash, or where the law of the State concedes this power, then the fact that they are so paid for at a fair valuation of the property, affords no ground of complaint to the creditors, provided such payment is made and accepted in good faith. In fact, in order to render the transaction void either gross over-valuation or actual fraud must be shown.[1]

In order to obtain a clear understanding of the distinction that exists between the true value rule and the good faith rule, it is necessary to understand the reasons which actuated so many of the courts in repudiating in the first instance the trust fund doctrine in order to clear the way for the adoption by such courts of the good faith rule. Nowhere will be found a better statement of this matter than that presented by Justice William Mitchell of the Minnesota Supreme Court in the case of Hospes *v.* Northwestern Manufacturing Company.[2]

"It is difficult," said Justice Mitchell, "if not impossible, to explain or reconcile decisions and cases bearing upon the trust fund doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insol-

[1] Bank *v.* Alden, 129 U. S. 372; 32 L. E. 725; Rood *v.* Wharton, 74 Fed. 118; Coit *v.* Company, 119 U. S. 343; 7 S. Ct. 231; Boynton *v.* Hatch, 47 N. Y. 225; Van Cott *v.* Van Brunt, 82 N. Y. 535; Whitehill *v.* Jacobs, 75 Wis. 474; 44 N. W. 630; Young *v.* Company, 65 Mich. 111; 31 N. W. 814.

[2] 48 Minn. 174; 50 N. W. 1117.

vent the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholders in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus stock.' This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the 'trust-fund' doctrine has involved it; and we think that even when the 'trust fund' doctrine has been invoked the decision in almost every well-considered case is readily referable to such a rule."

Another statement of the good faith rule is to be found in Kelley *v.* Company,[1] to the following effect: If the nature of the property and the extent of the valuation are such that the latter might have been due to errors of judgment, then to render the transaction invalid as against creditors actual fraud must be shown, and the question is one of fact. On the other hand, if the over-valuation is so gross that it could not have been due to mere errors of judgment, the transaction will be held fraudulent as a matter of law.[2]

§ 106. **Statement of "Speculative Value Rule."** — It must be admitted that neither the "true value rule" nor the "good

[1] 21 Mont. 319; 51 Pac. 959.

[2] Coleman *v.* Howe, 154 Ill. 458; 39 N. E. 725; N. H. H. N. Co. *v.* Company, 142 Mass. 349; 7 N. E. 773; Hastings Malting Co. *v.* Company, 65 Minn. 28; 67 N. W. 652; Northern Trust Co. *v.* Company, 75 Fed. 936; affirmed in Dickinson *v.* Northern Trust Co., 80 Fed. 452; Washburn *v.* Company, 81 Fed. 17; Goodrich *v.* Reynolds, 31 Ill. 490; Edwards *v.* Company, 27 La. Ann. 474; Whitehill *v.* Jacobs, 75 Wis. 474; 44 N. W. 630; Humaston *v.* Company, 20 Wall. 20; State *v.* Webb, 110 Ala. 214; 20 So. 462; Skinner *v.* Smith, 134 N. Y. 240; 31 N. E. 911; Parmalee *v.* Price, 208 Ill. 544; 70 N. E. 725; Phelan *v.* Hazard, 19 Fed. Cases No. 11068; 5 Dill. 45; Smith *v.* Ferrier, etc. Ry. Co. (Cal.), 51 Pac. 710; Jenkins *v.* Bradley, 104 Wis. 540; 80 N. W. 1025; Gamble *v.* Q. C. W. Co., 123 N. Y. 91; 25 N. E. 201; Young *v.* Erie Iron Co., 65 Mich. 111; 31 N. W. 814; Bank *v.* Alden, 129 U. S. 372; 32 L. E. 725; Coffin *v.* Ransdell, 110 Ind. 417; 11 N. E. 20; Bickley *v.* Schlag, 46 N. J. Eq. 533; 20 Atl. 250; S. R. C. S. Co. *v.* Rankin, 45 Ill. Ap. 226; Bruner *v.* Brown, 139 Ind. 600; 38 N. E. 318; Gilkie, etc. Co. *v.* D. T., etc. Co., 46 Neb. 333; 64 N. W. 978; A. T., etc. Co. *v.* Hays, 165 Pa. St. 489; 30 Atl. 936; Jones *v.* Whitworth, 94 Tenn. 602; 30 S. W. 736; M. T. Co. *v.* S. C., etc. Co., 16 Wash. 499; 48 Pac. 333; Taylor *v.* Cummings, 127 Fed. 108.

faith rule" affords a satisfactory basis for determining all questions that may arise relative to the issuance of the capital stock of a corporation as full-paid and non-assessable in exchange for property transferred to it. In practice, neither the inequitable "true value rule" nor the fairer "good faith rule" will be found to rest on any satisfactory or substantial basis. Of late years, without in terms calling it by that particular name, courts of high repute have in substance adopted what will be termed here the "speculative value rule." This may be defined as that rule whereby a corporation is permitted, in issuing its capital stock as full paid and non-assessable in exchange for either real or personal property, to appraise the latter at its potential speculative value, looking towards its future development rather than at its present intrinsic value. The statement of the rule would be incomplete without adding that in all cases where such appraisal is questioned, the burden of proof of attacking the same is upon the creditor.

The rule in its practical application throws upon the creditor the burden of showing that, viewed from a purely speculative standpoint, the appraisal made by the corporation of such property constituted not merely an over-valuation, but a fraudulent over-valuation as well. Before attempting to discuss at length the "speculative value rule," as stated above, it might not be without its advantage to trace briefly those evolutionary steps along legal lines which appear to have paved the way for a fuller recognition on the part of the courts of the rule here contended for. In the first place, we have the enunciation by Justice Story, in 1824, of the now all but moribund "trust fund doctrine" already referred to.[1] Then ensued a period of years when the courts, one after another, proceeded to adopt the doctrine just mentioned, although it was unknown to the common law. Gradually, however, it came to be recognized that the trust fund theory was wrong in principle as well as inequitable, leading in its practical operations to harsh and unconscionable results. This gradually led to the adoption by many courts of a better and more enlightened doctrine which predicated the liability of stockholders to creditors, not upon the trust fund doctrine, but upon the sounder ground of fraud.[2]

[1] See Wood *v.* Dummer, 3 Mason, U. S. 308.

[2] See statement of this doctrine by Justice Mitchell in Hospes *v.* Company, 48 Minn. 174; 50 N. W. 1117.

This was followed by the enunciation on the part of certain courts of several important rules governing the question of the burden of proof in cases where attempts were made by creditors to enforce an alleged stockholder's liability, on the ground that the property against which such stock had been issued had been grossly over-valued. A fair presentation of the rules here referred to may be found in the opinion of the Supreme Court of Minnesota, in Hastings Malting Co. *v.* Iron Range Brewing Co.,[1] reading as follows:

"In principle it can make no difference whether the stock issued as paid up is bonus stock, pure and simple, or whether it was sold for cash for less than its par value, or for property at a gross over-valuation. In the first two cases the question of fraud would be one of law, for on the issuing by the corporation of its stock as paid and its acceptance by the stockholders when in fact nothing was ever paid for it, or where a sum of money less than its par value was paid and accepted for it, there is no opportunity for a mistake of judgment; the law in such cases presumes an intention to defraud. Ordinarily, however, the question is one of fact.

"Upon principle and authority a corporation may in good faith issue paid up shares of its stock for the purchase of property at a fair valuation, and in such case the corporation and its creditors are bound by it.

"In the practical application of the rule it must be kept in mind that fraud, actual or constructive, is the basis of the stockholders' liability to the creditor. On the one hand, the value of the property is to be determined, not from subsequent events, but as of the time of the transaction, and from the nature, situation, and condition of the property as they honestly appeared to the parties at the time. Although there was in fact an over-valuation of the property, it will not render the stockholders liable for the deficiency if it was the result of an honest mistake or error of judgment. On the other hand, where the nature and condition of the property are such that its value is well known and understood, or is capable of being readily estimated and ascertained, and the property is transferred to the corporation at a gross over-valuation for paid-up shares, the transfer is *prima facie* fraudulent as to subsequent creditors, and as against them the burden is upon the shareholders to rebut the presumption."

It is a principle of law universally recognized that, except in cases of trust relationships, the burden of proof in all cases relative

[1] 65 Minn. 28; 67 N. W. 652.

to proof of fraud is cast upon the party who alleges that such fraud exists.[1]

By no stretch of the imagination can the relationship that exists between creditors of a corporation and the corporation itself be termed a "trust relationship." The relation is neither confidential nor fiduciary, as the same is construed by the courts.[2] There is no more reason for treating this relationship as one of trust than there is in the case of ordinary creditors and debtors. It was doubtless, however, as a sort of concession to the fanciful trust fund doctrine of Justice Story, that there early appeared a tendency, upon the part of certain courts, to engraft thereon the absurd principle that, where the board of directors of a corporation have duly appraised in the first instance property taken by the latter in exchange for its capital stock, the rule should obtain that where such property has a well known or easily ascertained value, and is taken at a valuation which to the court seems greatly in excess of its real value, then in such cases it will be presumed that such valuation is not made in good faith, but is made for a fraudulent purpose. To overcome this presumption the burden is upon the stockholders to introduce satisfactory evidence explanatory of this presumptively fraudulent over-valuation. Some courts even went further, and asserted that where the over-valuation was so great that the fraudulent intention appeared on its face and it is not explained, it should be held fraudulent as a matter of law, without submitting the question to a jury.

These drastic rules had full sway for a number of years, until certain of the courts saw fit to modify their rigor to no inconsiderable extent. Then the rule was enunciated that where stock has been paid for either in property or services, although it appears that there was an over-valuation in appraising the same, yet if it appears to the court not to be so gross and unconscionable as to compel it to say, as a matter of law, that it must have been intentional, it will be presumed that the valuation was honestly made, and the burden of attacking the same will be upon the creditors who seek to hold the stockholders upon an alleged stockholders' liability for unpaid stock subscriptions.[3]

[1] See Phelan *v.* Hazard, 5 Dil. 45; Bickley *v.* Schlag, 46 N. J. Eq. 533.

[2] See Robinson *v.* Pope, 57 Cal. 496.

[3] Coleman *v.* Howe, 154 Ill. 458; 39 N. E. 725; Davis Bros. *v.* Company, 101 Ala. 127; 8 S. W. 496; Manhattan Trust Co. *v.* Company, 16 Wash. 499; 48 Pac. 333.

So much, then, for the historical development of the various doctrines relative to the subject matter now before us. Turning again to consider the "speculative value rule," the same must be looked at from two separate and distinct standpoints, to wit: (1) as dividing all properties which a corporation proposes to take over in exchange for its capital stock into two broad and well-defined classes, known respectively as "speculative" and "non-speculative" properties; (2) as establishing a rule for appraising the value of speculative properties based not upon the intrinsic value of the same, but rather upon their availability for purposes of speculation, looking towards an enhancement of their present value by the future expenditure of funds in the development thereof.

Let us now turn our attention to the classification of properties above referred to designated as "speculative" and "non-speculative." "Speculative" properties may be defined as those whose nature is such that they have not only a present intrinsic value, but a considerable potential value as well, speculative in its nature, and dependent upon future development in order to arrive at a definite estimation as to the amount thereof. Non-speculative properties, on the other hand, are those whose intrinsic worth alone gives them a market value or a value which can be easily ascertained by reference to well-recognized standards of value. In the first class of properties might be enumerated mining rights, patent rights, oil and gas lands, secret processes and trade secrets, patent medicines, etc. In the second class might be named real estate to be employed for business, dwelling, farming, and grazing purposes, stock in trade and personal property which is the common subject of bargain and sale between man and man at current prices, determined by the law of supply and demand. In the opinion of the Supreme Court of Minnesota, in Hastings Malting Company *v.* Iron Range Brewing Company, cited above, it will be noted that the rule that is to be applied in those cases where the nature and condition of the property are such that its value is well known or understood, or is capable of being readily estimated and ascertained, is clearly stated. The opinion, however, fails to state with equal clearness the rule that is to be applied where the value of the property is not of the character just described, but is of that type herein referred to as "speculative," having no present or well-known readily ascertained

value, but depending entirely upon future development in order to determine what such value may be. By implication only is the true rule in such cases suggested by the Minnesota court. However, in Kelly *v.* Clark,[1] the Montana Supreme Court in effect declares the rule in such cases to be that where the property is speculative in character, and as such the alleged over-valuation thereof may have been possibly due to errors in judgment, then the burden of proof is upon the creditors seeking to attack the valuation by showing actual fraud in the transaction.

Let us turn now to the question as to how the valuation of speculative properties is to be ascertained. Generally speaking, the rule to be adopted is this: "What, under all the circumstances, considering the proposed use to which it is to be put, and the general purpose for which the corporation was created, is the fair value of the property against which its capital stock is to be issued?"[2] In this age of speculative enterprises it is a matter of common knowledge that the value of properties taken over by corporations about to embark in speculative enterprises is dependent almost wholly upon their availability for the purpose in hand and upon the promise which external appearances give them as to their having a large and considerable potential value. Thus, for example, sixty square feet of land may have a very small intrinsic value when considered as farming, grazing, or residence property, and yet possess an immense potential value when treated as mining property. It is the expectation of success which induces investors to put their money into such enterprises, and which justifies a valuation far in excess of the property's intrinsic value. Such valuations, it must be admitted, are necessarily arbitrary in character. This fact the legislatures in many States have recognized, and the courts should not hesitate to do the same.[3]

The value of property which is transferred to the corporation is also not to be estimated by what it cost the promoter. It is the speculative and experimental results which afford a basis for the large valuation. By value in such cases is meant the speculative value for the uses and purposes of the company in its proposed speculative enterprise, and not the actual market value or the

[1] 21 Mont. 291; 53 Pac. 959.
[2] See Gamble *v.* Company, 123 N. Y. 91; 25 N. E. 201.
[3] See Civil Code of Montana, 1895, § 410.

actual intrinsic value thereof at the time the properties are taken over by the company.

The view of the matter here presented was first suggested, it is believed, by the United States Circuit Court many years ago in the case of the South Mountain Consolidated Mining Co.[1] At the trial below in this case the court spoke as follows:

"The mode in which mining companies are formed is familiar to all. The owners of the property, or persons expecting to become such, by complying with a few simple formalities form themselves into a corporation, to which the property is conveyed. The amount of capital stock which is required to be stated in the certificate of incorporation is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate. It neither bears nor is intended nor supposed by the public to bear the slightest relation to the real value of the property — a value nearly always conjectural and very often imaginary."

In this same case on appeal the court observed as follows:[2]

"The mode of forming mining corporations is well known to any body. A prospector finds, as he supposes, a valuable mine. It requires capital to work it which he does not possess. He goes to the money and business centres, where he finds capitalists accustomed to organize corporations for the development of new mines, and makes such arrangements as he can. He presents such evidence of the value of his mine as he has obtained. Little is known of the real value. It may be worth nothing and it may be worth millions. Parties are found willing to take hold of the enterprise. They agree to incorporate and fix the capital stock at some purely nominal amount, and divide it into a certain number of shares, corresponding to the amount of capital adopted. The owner of the mine, for an agreed number of shares and in consideration of the promises of the other parties to assist in the development of the mine, conveys the mine and receives for it the amount of stock agreed upon. The other parties, for their services in organizing and managing the company and its business, receive a large portion of the stock, this being usually a considerable amount of stock reserved by the company, which is put upon the market and sold for such price as can be obtained, to raise a fund to secure machinery and develop the mine. The price of this stock is of course determined by the prospect of the mine, its location, and its probable richness, and the confidence of the public reposed in

[1] 7 Sawyer, 30; 8 Sawyer, 366.
[2] 8 Sawyer, U. S. 366.

the experience, ability, and character of those having the management. Mining corporations are *sui generis*. They are organized and carried on upon principles wholly different from banking, railroad, insurance, and ordinary commercial corporations having a subscribed capital stock."[1]

But nowhere is the speculative element in the valuation of property better considered than by the Supreme Court of Pennsylvania, in the case of Iron Co. *et al. v.* Hays *et al.*[2] The facts in this case briefly stated are as follows:

A corporation was organized by two co-partners to take over certain lands owned or leased by them and believed to contain gas and oil. They capitalized the company for $500,000, and issued the whole of its capital stock to themselves against the properties above referred to. These latter had an intrinsic value representing but a very small percentage of the capitalization of the company. The incorporators retained $175,000 of the capital stock of the corporation for their own benefit, and transferred the balance to the corporation in trust to be sold by the board of directors thereof for the purpose of procuring working capital for the corporation. Later on, the lands proved to be practically worthless, and the company became insolvent, and creditors thereof sued the stockholders, alleging that the stock held by them had not been fully paid for. In passing upon the various legal questions involved, the court spoke as follows:

"Attention should be called first to the method of organization, to the facts showing the situation of the parties, the necessity for obtaining corporate powers, and the provision made for a working capital with which to enter upon the proposed corporate enterprise.

"The corporators had been partners. As such they had been engaged in procuring leases and drilling wells in search for oil. In their search they had not been successful, but two of the wells drilled by them proved to be valuable gas wells. This, taken in connection with other developments in the same general region, was well calculated to induce the belief that they were the possessors of a large and valuable gas territory that should be promptly developed and utilized or its value would steadily decline by reason of drainage from the operation of others. They could not utilize their gas without transporting it to a market. They could not transport it to advantage except as a natural gas company possessing the powers conferred by

[1] *In re* South Mountain Con. Min. Co., 8 Saw. 366.

[2] 165 Pa. St. 489; 30 Atl. 936.

law. This determined them to organize a corporation for the production and transportation of natural gas and to transfer their gas wells and leases to the corporation. When this had been decided on, the first question to present itself was, how shall the partnership convey its property to the corporation so as to secure to its members the same relative interest in the stock of the corporation they now have in the partnership property? The next question was, how shall we secure the necessary working capital to enable the corporation to go forward with the work of producing, transporting, and selling natural gas? In a general way these questions were answered by the adoption of the scheme already referred to. The value of the properties held by the firm was set down at $175,000, the working capital needed at $325,000. To meet both purposes the capital stock of the corporation was fixed at $500,000. *It was all to be issued as paid up stock in exchange for the property conveyed to the corporation*, subject to the agreement that all except $175,000 thereof was to be contributed to the treasury to be sold as a means of raising the money needed for a working capital. . . .

"In what respect, then, have the defendant stockholders failed in the performance of their undertaking to the corporation? The scheme was to turn over all the gas wells, leases, etc. to the corporation for $175,000, and provide it with the means of prosecuting the gas business *by putting into its treasury paid up stock, or what should be sold as paid up stock*, to the amount of $325,000 more. . . .

"The court below found 'that the facts in evidence, connected with the fact that within a few months it was demonstrated that the property was of very small value, threw on the stockholders the burden of showing clearly that the sale from themselves to themselves was in good faith on a reasonable belief in the value of the property.' *But what has the fact that, after some months spent in development of their territory, the corporation found itself disappointed in its productiveness and a heavy loser in consequence, to do with the good faith of their purchase or the reasonableness of the price?*

"*These are to be judged of by the facts before them when the arrangement was made. The character of the gas wells already opened, the extent of the territory covered by the leases, its relation to other developments, its nearness to an adequate market, and the probable duration of the supply within reach, were the considerations that would affect the judgment of buyers and sellers and of the business public as to its value. The subsequent disappointment must therefore be left out of the case, and the transaction examined in the light in which it was seen when the arrangement was entered into. When this is done and the absence of any suggestion or finding of fraud is remembered, it is not easy to see*

what there is in the case to shift the burden of proof or to require the stockholders to establish the good faith of the transaction which the plaintiffs have not attacked. The action proceeds on the theory that the subscriptions to the capital stock are wholly unpaid. The proofs show that they were paid exactly in accordance with the agreement, and that this payment had been recognized by the corporation from the first. The decree, as finally made, seems to rest on the conclusion that although paid they were paid in property which was taken at too high a price. It is true that no such thing was alleged in the bill or shown in the proofs, but if the value of the property is to be determined in the light of subsequent events, a light which the parties did not have when this sale was arranged, the conclusion of the court below would be reasonable. The trouble with it, however, is, that it rests on the intrinsic value of the property as ascertained by actual developments made after the sale, while the real question relates to the apparent value as indicated by the circumstances existing at the time of the sale. . . .

"We should agree with the court below that the property was sold at more than its actual value, if that value was to be determined by subsequent results rather than by prospects as they appeared at the time of sale. But if the parties were mistaken in relation to its value, we do not see how, in the absence of any averment of fraud in the transaction, the sale can be disregarded and the subscriptions to the capital stock treated as unpaid. The proofs show that they were paid exactly in accordance with the agreement under which they were made, and until that agreement is attacked as fraudulent, the creditors stand in no better position than the corporation itself. The decree is reversed so far as it requires payment of the stock subscriptions or any part thereof."[1]

So much, then, for the question as to the proper basis for appraising property of a speculative character when the same is transferred to the corporation in exchange for its capital stock. Let us add a few more words to what was said in the foregoing opinion relative to the question as to where the burden of proof lies in such cases, when the valuation placed upon the property is impeached by creditors who seek to enforce an alleged stockholder's liability for unpaid stock subscriptions. Let us note in this connection, first, the statement of the law made by the Court of Appeals of Maryland in Brandt *v.* Ehlen,[2] where the court observed "we take the law to be well settled, that a company

[1] See also Kelly *v.* Clark, 21 Mont. 291; 53 Pac. 959; Montana Ry. Co. *v.* Warren, 6 Mont. 275; 12 Pac. 641.

[2] 59 Md. 1.

may receive, in payment of the shares of its capital stock, any property which it may lawfully purchase. So long as the transaction stands unimpeached for fraud, the courts will treat as a payment that which the parties shall agree to be a payment, and this too in cases where the rights of creditors are involved." The Supreme Court of Massachusetts in a recent case[1] observed that it appears to be well settled that in the absence of fraud an agreement can ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines, or other property to which it is not easy to assign a determinate value. At least, one court of high authority has adopted the rule that where one becomes a creditor of a corporation knowing the manner in which its stock has been paid, he is deemed to waive his right to assert that there has been an over-valuation of the property against which the corporation issued its stock.[2] It is to go but a step forward to say that in the case of corporations engaged in speculative enterprises it is a matter of common knowledge that shares are to be paid for in property appraised at its potential rather than its present intrinsic value, and that therefore the rule stated above should obtain, even in the absence of actual knowledge on the part of creditors as to the manner in which the capital stock of the corporation had been issued. Again, where stock has been paid for by the conveyance of property to a corporation of the character known as "speculative" and upon which a valuation has been placed, — not its present intrinsic value, but rather its prospective value after development thereof, — then in such cases the courts should presume that the valuation was honestly made and place the burden upon the creditor of attacking the transfer.[3]

The ordinary practice, as has been observed, is for corporations engaged in non-speculative enterprises to issue stock for property which has a well-recognized market value or one which can be easily ascertained. In regard to such corporations, where the nature and condition of its property is such that its value is well known or understood or is capable of being readily estimated and ascertained, and the same is transferred to the corporation at a gross overvaluation for paid up shares, it would unquestionably be proper

[1] N. H. H. N. Co. *v.* Company, 142 Mass. 349, 7 N. E. 773.

[2] Callanan *v.* Windsor, 78 Ia. 193; 42 N. W. 652.

[3] Davis *v.* Company, 101 Ala. 127; 8 So. 496; Coleman *v.* Howe, 154 Ill. 458; 39 N. E. 725; Carr *v.* Le Fevre, 27 Pa. St. 489; Shield *v.* Company, 94 Tenn. 123; 28 S. W. 668.

for courts to treat such transactions as presumptively fraudulent, and to place the burden of proof upon the stockholders in such cases to rebut such presumption by clear and satisfactory proof. On the other hand, where the corporation is engaged in speculative enterprises of the character above referred to, and stock is issued against property accepted by the corporation at a valuation not based upon the present intrinsic value of the same, but avowedly (as is the universal custom) at its potential speculative value (to be determined after development thereof by the corporation which has acquired the property), then the practical attitude for the courts to take in such cases would be to adopt what is termed here the "speculative value rule," and to attach to the valuation placed by the corporation upon such property the presumption that it was honestly made, and place the burden of proof in such cases upon the creditor attacking the transaction. In practical operation it will be found that the shifting of the burden of proof would be equivalent in nearly all cases to making the valuation placed upon the property in any case, whether speculative or non-speculative in character, conclusive respectively upon the stockholders and the creditors. The reason of this is that in the case of non-speculative properties it is easy to demonstrate that the same has been grossly overvalued; as, for example, by showing the market value of the same. Again, in the case of speculative enterprises the same is true for the reason that the valuation placed upon the properties from a speculative standpoint, if honest and fair, would be such as to render it practically impossible as a matter of proof to show that such valuation was fraudulent or grossly overvalued, — this for the reason that in every such case it will be found that there exists an immense margin for honest difference of opinion, and although it may appear that there were serious errors of judgment, nevertheless it will be found in practice that such valuations should not and will not be set aside except for actual fraud.

It is the recognition of the necessity of shifting the burden of proof according to whether the property against which stock is issued is speculative in character or not, which, in connection with the basis of appraisal already referred to, affords a practical basis for the operation of the speculative value rule. Finally, the following may be said:

Upon principle and in the interest of justice both to the stockholders and creditors alike, in determining the question whether

stock has been in fact fully paid, the line should be drawn with the utmost clearness and distinctness between ordinary corporations such as trading, mercantile, banking, insurance, etc., whose capital stock is formally subscribed for and ordinarily paid in in cash or in real and personal property having a well-recognized or easily established market value on the one hand, and those corporations on the other hand incorporated for the express and avowed purpose of engaging in speculative enterprises — such, for example, as corporations organized to take over mining properties, oil and gas lands, patent and patent rights, secret processes, concessions, franchises, etc. In this era of speculative enterprises the courts can no longer remain blind to the fact that the stock of such corporations is not intended by the incorporators or understood by the creditors or the public generally to represent anything but certain property having a speculative value, which may or may not ultimately prove to be worth the par value of the stock against which the latter has been issued. The credit obtained by such corporations concerning which the courts have in the past displayed such intense solicitude in the interest of creditors to the exclusion of the interests of equally meritorious stockholders, is seldom, if ever, extended to the corporation without full knowledge on the part of creditors as to the nature of the assets of the corporation, or as to the manner in which the stock has been issued in exchange for property of a speculative value.

§ 107. **Effect of Appraisal of Property by Directors under Statutory Authority, when taken in Exchange for Stock.** — The incorporation acts of Connecticut, Delaware, Maine, Montana, New Jersey, New York, North Carolina, South Carolina, Virginia, and West Virginia all contain provisions relating to the effect of appraisal of property by directors when taken by the corporation in exchange for its capital stock. The provisions of the New Jersey act may be given as an example of such legislation. The statute referred to reads as follows:[1]

"Any corporation formed under this act may purchase mines, manufactories, or other property necessary for its business or the stock of another company or companies owning a mine, manufactory, or producing mills or other property necessary for its business, and issue stock to the amount of the value thereof, in payment therefor,

[1] Public Laws of New Jersey, 1896, chap. 85, § 49.

and the stock so issued shall be full-paid stock and not liable to any further call, nor shall the holder thereof be liable for any further payments under any of the provisions of this act, and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive."

In commenting upon the foregoing section in the case of Donald *v.* American Smelting & Refining Co.,[1] the court spoke as follows:

"The distinction between the contemplated issue of corporate stock for property and its issue for money lies not in the rule for valuation, but in the fact that different estimates may be formed of the value of property. When such differences are brought before judicial tribunals, the judgment of those who are by law entrusted with the power of issuing stock to the amount of the value of the property, and upon whom therefore is placed the first duty of valuing the property, may be accorded considerable weight. But it cannot be deemed conclusive when duly subjected to judicial scrutiny, nor is it necessary that conscious over-valuation or any form of fraudulent conduct on the part of its primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination of the elements of value, or if based in part upon an estimate of matters which really are not property, or if plainly weighed by self-interest, may lead to a violation of the statutory rule as surely as would corrupt motives. The original issue of corporate stock is a special function in the exercise of which the legislature has fixed the standard to be observed, and it is the duty of the courts, so far as their jurisdiction extends, to see that this standard is not violated either intentionally or unintentionally. When corporate stock has once been issued for property purchased, then the legislature has directed the application of a different rule. In the words of the statute, 'the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payment under the provisions of this act; and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive. Under these provisions, after the property has been purchased and the stock issued therefor, nothing short of actual fraud in the transaction can impair the right of the holder to hold his stock as full-paid stock, free from further call.'"[2]

[1] 61 N. J. Eq. 458; 48 Atl. 786.

[2] See also Wetherbee *v.* Baker, 35 N. J. Eq. 501; Bank *v.* Lumber Co., 32 W. Va. 357; 9 S. E. 243; Richardson *v.* Graham, 45 W. Va. 134; 30 S. E. 92; Clark *v.* Bever, 139 U. S. 96; 11 S. Ct. 468; Fogg *v.* Blair, 139 U. S. 118; 11 S. Ct. 496; Liebke *v.* Knapp, 79 Mo. 22.

§ 108. **Effect of Appraisal of Value of Property by State Officials when the same is taken by Corporations in Exchange for their Capital Stock.** — Owing to the conflicting decisions of the courts of the various States relative to what does and what does not constitute as against creditors full payment of the capital stock of a corporation, attempts have been made by the legislatures of a number of the States to remedy this situation by means of statutory enactments. Such legislative enactments may be said to be indicative of the public policy of the State in that regard. The "public policy of the State," as the term is used in this connection, frequently varies from time to time. In the absence of express statutes of the character here referred to, it has been said that it is not to be measured by the private combinations or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the law-making power, and in the absence of them to the decisions of the courts. When, however, the legislature has spoken on a particular subject and within the limits of its special powers, its utterance then becomes the public policy of the State.[1] In view of the fact that the near future is likely to see many attempts by other legislatures to solve the question here referred to by the enactment of statutes governing the same, the matter now under consideration should receive careful attention.

It is a fair supposition to say that the passage of such acts in this country originated doubtless in a desire to transfer to this country certain sections of what is known as the "English Company's Act of 1867." Under the act just referred to, corporations which desired to accept property in exchange for their capital stock were required to register in a designated government office a description of the property against which any particular corporation proposed to issue its full-paid shares. The construction by the English courts put upon this section of the English Company's Act does not seem to give to the legislative provision referred to the full effect which is claimed for such statutes in this country. In substance the holding of the English courts in this regard is as follows:

That where the property is so registered under the act it is not unlawful for the vendor to sell such property to the corporation in

[1] See MacGinniss *v.* Company (Mont.), 75 Pac. 89; United States *v.* Association, 166 U. S. 290; 17 S. Ct. 540.

exchange for stock having a par value in excess of what the vendor paid for the property. That ordinarily the court will not in the interests of stockholders or creditors go behind the contract and inquire whether the consideration represents the full value against which the shares are issued unless the contract itself is impeached or the consideration on the face thereof appears to be insufficient or elusory.[1]

Turning now to the statutory enactments in this country of the same character, they may be explained as follows: In Florida the incorporation act there in force provides that incorporators may provide in the charter that the capital stock, either in whole or in part, shall be payable in property, labor, or services, at a valuation fixed in the charter. The latter must also contain a general description of the property to be taken in exchange for stock. In Utah the statute is very similar to the one in force in Florida. In Massachusetts the articles of organization must set forth the amount of capital stock to be issued, the amount thereof to be paid for in cash, and the amount thereof to be paid for in property. If such property consists of real estate, its location and the amount of stock to be issued therefor must be stated. If any part of such property is personal, it must be described in detail. The whole matter is then submitted to and passed upon by the commissioners of corporations. But the statute makes no provision relative to what the legal effect thereof shall be as to creditors where the issuance of stock in exchange for property is approved by the commissioners of corporations.

Unquestionably the most effective statute in existence is to be found in the Michigan act,[2] which in prescribing the requisites of articles of incorporation reads in part as follows: "The amount of capital paid in at the time of executing the articles, which shall not be less than ten per cent of the authorized capital, etc. Such capital stock may be paid in either cash or in other property, real or personal; but where payment is made otherwise than in cash there shall be included in the articles an itemized description of the property in which such payment is made, with the valuation for which such item is taken, which valuation shall be conclusive in the absence of actual fraud."

[1] *In re* Wragg, L. R. 1 Chan. 796; Ooregum Gold Min. Co. *v.* Ropes, 61 L. J. Chan. 337.

[2] Session Laws of 1903, § 232.

The intent of the legislature would clearly appear to be to establish conclusively that the property received and accepted by the corporation under the authority of the State in exchange for its stock constituted a fair equivalent of the amount of stock so given. It would seem to forbid all claim of fraud thereafter to be made, and to establish the valuation as conclusive upon both stockholders and creditors.[1]

§ 109. **Meaning of Non-Assessable Stock.** — In entering upon the subject of non-assessable stock as contrasted with full-paid stock the discussion of the former will be confined to questions arising between the corporation and its stockholders, while the latter will be discussed from the standpoint of the stockholder in his relation to creditors. It is unquestionably within the power of a corporation to agree with stockholders that stock shall be issued to them at less than par, and that when so issued shall not be subject to any further assessments on the part of the corporation.[2]

In West Virginia, Nevada, Wyoming, and other States this principle has found recognition in the incorporation acts in force in those Commonwealths. The West Virginia act will serve as a fair example. The law there provides in substance as follows: that upon the vote of three-fourths of the stockholders corporate stock may be sold or disposed of at less than par. The act then goes on to provide that nothing therein contained shall be construed as to prevent any mining or manufacturing company from issuing stock and negotiating the sale of the same in payment of real and personal estate for the use of the corporation at such price and upon such terms and conditions as may be agreed upon by the owners and directors or stockholders of the corporation, and any subscriber to the capital stock of any such corporation may pay for the same by the transfer and conveyance to such corporation of real or personal property upon such terms as may be mutually agreed upon. All stock so issued shall be full paid and not liable to any further call or assessment.

Such a statute as is here referred to unquestionably has the effect of making the stock non-assessable as between the corporation and the subscribers to its capital stock, but it clearly has not the effect of preventing subsequent creditors in case of insolvency

[1] See State *v.* Webb *et al.*, 110 Ala. 214; 20 So. 462.

[2] Esgen *v.* Smith, 113 Ia. 25; 84 N. W. 954.

compelling the payment of any unpaid balance on such stock.[1] On this subject Judge Showalter, in Northern Trust Co. *v.* Columbia Straw Paper Co.,[2] spoke as follows:

"Whatever may have been in fact the value of the property turned over to the company for its stock, the latter agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person in what was done. Neither any person then holding stock, nor any person who afterwards became a stockholder by assignment from one who then held the stock, can now make complaint on behalf of the corporation against the lawfulness of that transaction. This I take to be the settled law on that subject."

In the absence of statutory authority conferred upon the corporation or in the absence of unanimous consent of all the stockholders, it is clear that the directors of a corporation have no power to assess shares which have been fully paid up.[3]

§ 110. **Meaning of Full-Paid Stock.** — The term "full-paid stock" as here used may be defined to be stock whose par value has been paid either in cash or in property, the ownership of which does not subject the holder thereof to any further liability either to the corporation or to the creditors. The mere declaration that stock is full paid, either by resolution or by stamping upon the stock this statement, does not make it so, at least as to creditors.[4]

It has already been said that stock may be issued for less than its par value to subscribers as full paid and non-assessable and be binding as between the corporation and the stockholders.[5] Where statutes exist declaring that stock issued in a particular manner shall be full paid and non-assessable, they are merely to be construed to the effect that stock may be issued in this manner, and that the holders thereof shall not be held liable to further calls or assessments on the part of the corporation, but such immunity

[1] The Wyoming statute would appear to be materially different from the West Virginia and Nevada acts.

[2] 75 Fed. 936.

[3] Wells *v.* Company, 90 Wis. 442; 64 N. W. 69; Ventura, etc. Ry. Co. *v.* Hartman, 116 Cal. 260; 48 Pac. 65; Handley *v.* Stutz, 39 U. S. 417; 11 S. Ct. 530; Gary *v.* Company, 9 Utah, 464; 35 Pac. 494; Pacific Fruit Co. *v.* Coon, 107 Cal. 447; 40 Pac. 542.

[4] Upton *v.* Triblecock, 91 U. S. 345; 23 L. E. 203; F. N. Bank *v.* Company, 42 Minn. 327; 44 N. W. 198; National Tube Works *v.* Gilfillan, 124 N. Y. 302; 26 N. E. 538; Kroenert *v.* Johnston, 19 Wash. 96; 25 Pac. 605.

[5] See Scoville *v.* Thayer, 105 U. S. 143.

will not be extended in such suit so as to prevent subsequent creditors enforcing their claims for the payment of the unpaid residue.[1] Many of the States have statutory provisions to the effect that no corporation shall issue stock except for money paid, labor done, or property actually received, declaring all fictitious increase of stock to be void. Under such provisions an original issue of stock as fully paid at less than par will be held to be void.[2]

Many cases will be found bearing upon the question as to the validity of so-called "bonus" or "promotion stock." In regard to the validity of such stock the courts differ. One line of decisions is represented by the courts of New York and Massachusetts. In Christensen *v.* Eno[3] the New York Court of Appeals spoke as follows:

"It may be admitted that the liability of subscribers on unpaid stock subscriptions constitutes an asset of the corporation which cannot be given up by the corporation without consideration on the part of creditors. The unissued shares of a corporation are not assets. When issued, they represent the proportionate interest of the shareholders in the corporate property, — an interest, however, subordinate to the claims of creditors. There are unquestionably public evils growing out of the creation and multiplication of shares of stock in corporations not based upon corporate property. The remedy is with the legislature. But the liability of a shareholder to pay for the stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has by accepting them committed any wrong upon the creditors or made himself liable to pay the nominal face of the shares as upon his subscription or contract."[4]

On the other hand, courts of almost equal authority have refused to treat such stock in the interest of creditors as full paid and non-assessable, and have enforced in their favor an alleged stockholders'

[1] Vt. Marble Co. *v.* Company, 135 Cal. 579; 67 Pac. 1057.

[2] Williams *v.* Evans, 87 Ala. 725; 6 So. 702; Perry *v.* Mill Co., 93 Ala. 364; 9 So. 217; Beitman *v.* Steiner, 98 Ala. 241; 13 So. 87; Stein *v.* Howard, 65 Cal. 616; 4 Pac. 662; Jefferson *v.* Hewitt, 103 Cal. 624; 37 Pac. 638; Kellerman *v.* Maier, 116 Cal. 46; 48 Pac. 377; Garrett *v.* Company, 113 Mo. 330; 20 S. W. 965.

[3] 106 N. Y. 97; 12 N. E. 648.

[4] Same rule in N. H. H. N. Co. *v.* Company, 142 Mass. 349; 7 N. E. 773.

liability thereon.[1] It has been held, however, that even though a stockholder has paid nothing for his stock, he is entitled to vote the same.[2]

[1] See Peninsula Savings Bank *v.* Company, 105 Mich. 535; 63 N. W. 514; Handley *v.* Stutz, 139 U. S. 417; 11 S. Ct. 530; De La Vergne Refrigerating Machine Co. *v.* German Savings Institution, 175 U. S. 40; 20 S. Ct. 20; 44 L. E. 65; Rogers *v.* Gross, 67 Minn. 224; 69 N. W. 894; Scoville *v.* Thayer, 105 U. S. 143; Garrett *v.* Company, 113 Mo. 330; 20 S. W. 965.

[2] Cartwright *v.* Dickinson, 88 Tenn. 476; 12 S. W. 1030; W. E. L. Co. *v.* Landy, 66 Vt. 248; 29 Atl. 248; see also Busey *v.* Hooper, 35 Md. 15.

CHAPTER V.

LEGISLATIVE CONTROL OVER DOMESTIC CORPORATIONS.

§ 111. **Statement of Principal Methods by which Legislative Control over Domestic Corporations is obtained.** — Under our modern system legislative control over domestic corporations ordinarily takes the following forms, to wit: (1) control over amendment of corporate charters; (2) reservation on the part of the State of the right to repeal all charters; (3) control over dissolution of corporations; (4) by the exercise through State officials of the right to forfeit charters by means of *quo warranto* proceedings; (5) by means of the exercise of the police power; (6) through legislative investigation into corporate affairs; (7) by requiring annual reports of corporations; (8) by compelling corporations to permit inspection of their books and records for the benefit of stockholders and creditors; (9) by means of anti-trust legislation; (10) by the enactment of statutes regulating the internal affairs of the corporation; (11) by the imposition of liability upon stockholders for corporate debts over and beyond their liability for unpaid stock subscriptions; (12) enactment of statutes imposing liability upon directors for misfeasance or non-feasance in office; (13) by means of legislative control over the extension of corporate existence; (14) by the exercise of the right of taxation upon corporations; (15) by regulating the right of consolidation of corporations.

§ 112. **Amendment of Charters.** — A glance at the general business acts in force in the several States and Territories will serve to show that in all of them more or less attention has been paid by the legislatures to the question of the right to amend — with more or less freedom — articles of incorporation. In a majority of these the power of amendment will be found to be practically unlimited. In nine the limitations imposed are not wide in scope, while in eleven the power referred to may be characterized

as being very narrow in its practical operation.[1] The practical questions to be considered in this immediate connection have reference, first, to ascertaining in what body the legislatures have seen fit to place the power of amendment, and, secondly, an inquiry whether the power when granted, apparently in the broadest terms, is in legal effect without any limitations whatsoever.

As a general rule, the directors have no power to amend charters unless such right is expressly conferred upon them by statute. Power to amend resides exclusively in the stockholders.[2] Turning now to the second inquiry referred to above, the following may be said. With respect to the right on the part of majority stockholders to exercise the power of amendment, there are two practical views of the question which deserve consideration. The first has reference to the effect, if any, the exercise of such right may have upon the right of the corporation to enforce stock subscriptions which were made in reliance upon the corporate purposes set forth in the original charter. The other relates to the binding effect of such amendments, when had, upon dissenting minority stockholders who have previously paid up their stock subscriptions.

In the first case it appears to be the generally accepted view that when a party makes a subscription to the capital stock of a corporation he does it in reliance upon the implied understanding that no changes shall be made in the charter without his consent which produce material and fundamental changes therein.[3] The rule however can clearly not apply where the changes made were trifling or immaterial or were in furtherance of the original objects of the corporation.[4] There is a well-defined tendency at the present time on the part of many courts to take the view that in order that a subscriber to the capital stock may escape liability on his subscription on the ground that there has been a material amendment to the charter since his subscription was made, that

[1] See Part II., Synopsis-Digest of the Corporation Acts of the Several States, under the head "Amendments."

[2] Gill *v.* Bayless, 72 Mo. 424; Ry. Co. *v.* Allerton, 18 Wall. U. S. 233; Ollesheimer *v.* Mfg. Co., 44 Mo. Ap. 172; Clough *v.* Company, 25 Col. 520; 55 Pac. 809; State *v.* Oftedal, 72 Minn. 488; 75 N. W. 692; Commonwealth *v.* Cullen, 13 Pa. St. 133; Abbott *v.* Company, 33 Barb. (N. Y.) 583.

[3] Mowrey *v.* Company, 4 Bissell (U. S.), 78; Printing House *v.* Trustees, 104 U. S. 711.

[4] Fry's Executors *v.* Company, 2 Metcalf (Ky.), 322; Peoria *v.* Preston, 35 Ia. 115 Milford, etc. Turnpike Co. *v.* Brush, 10 O. St. 111; Durfee *v.* Company, 5 Allen (Mass.), 230.

such amendment must necessarily have brought about changes of the most radical and fundamental character.[1]

Turning now to the second question here referred to, the following may be said. Important questions frequently arise as to the right of majority stockholders to amend the charter of the corporation against the dissent of minority stockholders so as practically to create an entirely new corporation with purposes and powers wholly different from those conferred in the original charter.

Before the passage of the modern liberal amendment acts, specifically authorizing majority stockholders to change *ad libitum* corporate purposes and powers, the rule undoubtedly was that majority stockholders had no power to depart, under the guise of an amendment to the charter, from the objects for the accomplishment of which the corporation was created. At that time majority stockholders would be enjoined on the application of minority stockholders from making fundamental and radical changes in the original corporate purposes, which had the effect of practically creating a new corporation, with power to engage in lines of business wholly foreign to that set forth in the original charter.[2] But whatever the rule may have been in times past, changed conditions have brought about material modifications therein.

Owing to the recent statutory enactments in the great majority of the Commonwealths relative to amendment of charters, it may be said that this question has ceased to be one of great practical importance at the present time, however it may have been in the past. In view of these statutory provisions it may be said that as a general rule the extent of the power of amendment when exercised by a majority of the stockholders according to the statute in such case made and provided, depends entirely upon the terms of such statute and the construction given by the courts thereto.[3] If broad

[1] Banet *v.* Company, 13 Ill. 504; Pacific Ry. Co. *v.* Renshaw, 18 Mo. 210; Sprague *v.* Company, 19 Ill. 174; Irvine *v.* Turnpike Co., 2 Pen. & W. (Pa.) 466; Cross *v.* Company, 90 Pa. St. 392; Troy, etc. Ry. Co. *v.* Kerr, 17 Barb. (N. Y.) 607; Worcester *v.* Company, 109 Mass. 103; Del. Ry. Co. *v.* Tharp, 1 Houst. (Del.) 149.

[2] Zabriskie *v.* Company, 18 N. J. Eq. 178; Stevens *v.* Company, 29 Vt. 545; Natusch *v.* Irving, 1 Smith's Cases, 226; Union Locks and Canals *v.* Towne, 1 N. H. 44; Ashton *v.* Burbank, 2 Dill. 435; Fed. Cases No. 582; H. & N. H. Ry. Co. *v.* Croswell, 5 Hill (N. Y.), 383.

[3] Day *v.* Company, 75 Ia. 694; 38 N. W. 113; Golder *v.* Bressler, 105 Ill. 419; Sprigg *v.* Company, 46 Md. 67; Hope Mutual Fire Ins. Co. *v.* Beckman, 47 Mo. 93; Detroit Chamber of Commerce *v.* Secretary of State, 109 Mich. 691; 67

in scope, they unquestionably permit majority stockholders to bring about radical and even fundamental changes in corporate purposes and powers if they so desire.

The question here presented is one of so much practical importance that it deserves more attention than has been yet given it. The New York Court of Appeals in Buffalo & New York City Railroad Co. *v.* Dudley [1] laid the foundation for the establishment in that State of the present just rule that there obtains with reference to the right of majority stockholders to materially change the corporate purposes against the dissent of minority stockholders. In that case the court permitted a change of name and an extension of the line of the railway by means of an amendment to the original charter. In passing upon this point the court spoke as follows:

"The stock subscription having been valid so as to give a right of action in case of non-payment to the corporation, did the alteration of the charter and the extension of the road subsequently absolve the defendant from his liability upon such subscription? The right to alter was reserved in the charter, and the subscription must be taken to have been made subject to having such additional powers conferred as the legislature might deem essential and expedient. The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation remaining still the same. It may be admitted that under this reserved power to alter and repeal the legislature would have no right to change the fundamental character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do. The additional powers are of the same character and have been regularly acquired from a legitimate source of power, and if they had been fairly exercised the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. The whole matter is manifestly a question of power; and if the power was legitimately acquired and has been exercised without fraud, the rights of the parties are in no respect changed as between themselves whether the alteration is beneficial or injurious to the defendant's interest.

N. W. 897; Mercantile Statement Co. *v.* Kneal, 51 Minn. 263; 53 N. W. 632; People *v.* Green, 116 Mich. 505; 74 N. W. 714.

[1] 14 N. Y. 342.

Whether he has made or lost by the change in no respect affects the question of authority in the plaintiff."

Many years later this same court, in discussing the respective rights of majority and minority stockholders or corporations, spoke as follows:

"The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the Company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of the different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any court to follow." [1]

It is difficult to find a better presentation of the more modern and better view taken of the question now under discussion than that to be found in the opinion of the Massachusetts Supreme Court in Durfee *v.* Old Colony & Fall River Railway Company.[2] While the case had special reference to the right of a State legislature to exercise its reserved right to amend corporate charters so as to produce radical changes in the purposes named in the original charter, nevertheless the reasoning is equally applicable to those cases where majority stockholders attempt equally radical amendments under general acts permitting such stockholders to amend charters on their own initiative.

"We suppose," said Chief Justice Bigelow in the case referred to, "it may be stated as an indisputable proposition, that every

[1] Gamble *v.* Company, 123 N. Y. 91; 25 N. E. 201.

[2] 5 Allen, 230.

person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law. This is an unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter. A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation, acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow corporators. The *jus disponendi* is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority however large. It cannot, therefore, be justly said that the contract, express or implied, between the corporation and the stockholders is infringed or impaired by any act or proceeding of the former which is authorized by a majority, and which comes within the terms of the original statute creating and establishing their franchise, and conferring on them capacity to exercise control over the rights and property of their members. On the contrary, the fair and reasonable implication resulting from the legal relation of the stockholders and the corporation is, that the majority may do any act either coming within the scope of the corporate authority, or which is consistent with the terms and conditions of the original charter, without and even against the consent of an individual member." Again, in this same opinion the court observed that, "in creating a corporation, no contract is made by the legislature with the individual members or stockholders, any further than they are represented by the artificial body which the act of incorporation calls into being. They have no other rights except those which exist or grow out of the constitution of the body corporate of which they are members. To

this can we only look, in order to ascertain whether there has been any breach of contract or violation of chartered rights. It constitutes, of itself, the contract by which the rights of all parties are to be governed. When, therefore, it is expressly provided between the legislature on the one hand and the corporation on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the legislature with the corporation, that the original act of incorporation should undergo no change except with his assent. Such a position may be asserted with more plausibility, if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: by the parties to the contract, the legislature on the one hand and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party. In such case, all persons claiming derivative rights or interests under the original contract, with notice of its terms, would be bound by the amendment or alteration to which the parties should agree. It is a mistake, therefore, to say that the contract of a stockholder with a corporation established under our statutes binds the latter to undertake no new enterprise and engage in no business or operation other than that contemplated by the original

charter. This interpretation puts aside the express provision authorizing an amendment or alteration of the act of incorporation, and gives it no effect as against a stockholder without his assent, although he bought his stock or subscribed for his shares subject to the legal effect of such a stipulation. The real contract into which the stockholder enters with the corporation is, that he agrees to become a member of an artificial body which is created and has its existence by virtue of a contract with the legislature, which may be amended or changed with the consent of the company, ascertained and declared in the mode pointed out by law. Having, by virtue of the relation which subsists between himself and the corporation as a holder of shares, assented to the terms of the original act of incorporation, he cannot be heard to say that he will not be bound by a vote of the majority of the stockholders accepting an amendment or alteration of the charter made in pursuance of an express authority reserved to the legislature, and which by such acceptance has become binding on the corporation."

In some few of the States, as for example Ohio,[1] the law provides that no amendment shall change substantially the original purposes of the organization. In many of the States great similarity is to be observed in the formalities necessary to be taken in order to legally amend the charter. Usually the matter is brought to the attention of the stockholders by a resolution passed by the board of directors directing the calling of a meeting of the stockholders for the purpose of passing upon certain proposed amendments. A meeting of the stockholders is then called in the manner prescribed by statute, if any, or according to the method set forth in the by-laws. If the requisite number of stockholders vote in favor of such amendment, a certificate to that effect is usually made by the officers of the corporation and filed in the same offices as is required in the case of the original articles of incorporation. Thereupon the amendment ordinarily becomes effective. If the statute does not prescribe the method of amending the charter, the only safe plan to pursue is to adopt substantially the same procedure therefor as is prescribed by statute in the case of original articles.[2]

[1] See Revised Statutes of Ohio, sec. 3258a; also State *v.* Taylor, 55 O. St. 61; Picard *v.* Hughey, 58 O. St. 577.

[2] Day *v.* Company, 75 Ia. 694; 38 N. W. 113.

§ 113. **Reserved Right of the State to repeal Charters.** — Without exception, under the system of incorporation now in vogue, each of the several States and Territories reserves the right in the granting of corporate charters under general acts to alter, amend, or repeal the same at any future time. The presence of such enactments is due to the decision of the United States Supreme Court in Dartmouth College *v.* Woodward,[1] wherein that tribunal announced the principle that the charter of a private corporation was entitled to protection from alteration, amendment, or repeal on the part of State legislatures under the clause of the Federal Constitution forbidding impairment of the obligation of contracts. When this case was decided, it became obvious at once that "many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to alteration, amendment, or repeal except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed." It was no doubt with a view to suggesting a method by which the State legislatures could retain in a large measure this important power without violating the provisions of the Federal Constitution, that Justice Story, in his concurring opinion in the Dartmouth College Case, suggested that, "when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract and could not therefore impair its obligation."[2]

With respect to the right to repeal, the power of the legislature in this regard, when exercised, is all but absolute, and the courts ordinarily will not inquire into the legislative motive for exercising it. Under such circumstances it will be presumed that the power is properly exercised.[3] The only exception appears to be that the courts will interfere where the legislature has exercised its power of repeal so wantonly and causelessly as palpably to violate the principles of natural justice.[4]

[1] 4 Wheaton, 518, decided in 1819.

[2] Greenwood *v.* Company, 105 U. S. 13.

[3] Greenwood *v.* Company, 105 U. S. 13; Wagner Free Institution *v.* Philadelphia, 132 Pa. St. 612.

[4] Lothrop *et al. v.* Stedman *et al.*, Fed. Cases, No. 8519.

Another question, however, is presented when the legislature attempts to alter or amend the charter. In order to justify the exercise of this power by the legislature the same must be so exercised as not to defeat or substantially impair the object of the grant or any rights vested under it which the legislature may deem necessary to secure either that object or some public right.[1] From the foregoing it is to be seen that the reserved power to repeal and alter is not unlimited. On this subject the U. S. Supreme Court, in Union Pacific Railroad Co. *v.* United States,[2] spoke as follows:

"That the power to alter or amend a charter even when reserved has a limit no one can doubt. All agree that it cannot be used to take away the property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. It may safely be affirmed that the reserve power may be exercised to almost any extent to carry into effect the original purposes of the grant or to secure the due administration of its affairs so as to protect the rights of stockholders and creditors, and for the proper distribution of its assets. Also to protect the rights of the public and of the incorporators or to promote the due administration of the affairs of the corporation. The alterations must, however, be reasonable. They must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of alteration or amendment."

§ 114. **Legislative Control over Dissolution of Corporations.** — Legislative control over dissolution of domestic corporations (omitting any reference to forfeiture of charters by State action,) is exercised in the following four ways: (1) by prescribing the maximum duration of corporate charters; (2) by permitting corporations to surrender their charters before organization; (3) by authorizing voluntary dissolution, with or without recourse to the courts; (4) by enacting statutes authorizing involuntary dissolution on application of stockholders or creditors. Each of these matters will now be taken up briefly for discussion.

(1) Legislative limitations upon corporate duration. In the absence of any provision in the governing statute or in the charter limiting corporate duration, the corporation is entitled to perpetual

[1] N. Y. & N. E. Railway Co. *v.* Town of Bristol, 151 U. S. 556.

[2] 99 U. S. 700.

existence.[1] The legislature may however, if it sees fit, limit the duration of corporate existence to any specific number of years. This right has been exercised in a majority of the States.[2] Upon expiration of the period of time limited in the charter as the duration of corporate life, dissolution results by operation of law.[3] If the articles provide for a longer period of duration than the law allows, then the excess is of no force or effect.[4]

In many of the States statutes exist continuing the existence of corporations after the expiration of the period limited in their charters for certain periods of years in order to permit them to close up their corporate affairs. Such statutes may be lawfully enacted subsequent to the creation of the corporation, for the reason that they provide for the enforcement of rights which equity recognizes even in the absence of statute.[5]

(2) Surrender of charter before organization. Statutes exist in the States of Connecticut, Delaware, Maine, Massachusetts, Nevada, New Jersey, New York, North Carolina, Virginia, West Virginia, and Wisconsin expressly permitting corporations to surrender their charters either prior to organization or to the commencement of corporate business. It is unquestionably true that in order to render such a surrender valid it must have been made under authority of the statutory provision enacted, which is of course equivalent to acceptance by the State.[6]

(3) Voluntary dissolution with or without recourse to the courts. "Charters," it has been said, "are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It

[1] F. L. & S. Co. *v.* Clowes, 3 N. Y. 470.

[2] See Part III. Table 13, page 583.

[3] Mason *v.* Company, 25 Fed. 882; Bradley *v.* Reppell, 133 Mo. 545; 32 S. W. 645.

[4] People *v.* Cheeseman, 7 Col. 376; 3 Pac. 716.

[5] Foster *v.* Bank, 16 Mass. 245; Singer *v.* Hutchinson, 183 Ill. 605; 56 N. E. 388.

[6] Taylor *v.* Holmes, 14 Fed. 98; Revere *v.* Company, 15 Pick. (Mass.) 351; Combes, *v.* Keyes, 89 Wis. 297; 62 N. W. 89; Law *v.* Rich, 47 W. Va. 634; 35 S. E. 858; Marinets *v.* Sewall, 50 Me. 220; Barton *v.* Association, 114 Ind. 226; 16 N. E. 486.

is the acceptance which gives efficiency to the surrender. Dissolution of a corporation extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist."[1]

The foregoing statement of the law is unquestionably based upon both reason and authority. Accordingly, a corporation may dispose of all its assets, cease entirely to do business, and neglect to elect officers or hold meetings of any kind, yet it cannot be legally dissolved by any action of its stockholders or a surrender of its charter unless such surrender is authorized by some statute.[2]

Where statutes exist authorizing dissolution of corporations prior to the termination of the period limited in their charters, such statutes are of course equivalent to an acceptance by the legislature of the surrender of the charter. All that is necessary is that the statute shall be substantially complied with in order that the dissolution may be effective.[3]

It may be remarked, in passing, that no cessation or abandonment of its corporate business, failure to hold corporate meetings or to elect officers, alienation or loss of all its property, has the effect in law of dissolving the corporation.[4]

(4) Involuntary dissolution on application of stockholders and creditors. Most of the States have enacted statutes giving courts possessing equitable powers the right to wind up corporations for cause shown upon application of some stockholder or on petition of creditors. But such proceedings, even when the corporation is insolvent, do not necessarily dissolve the corporation, unless the statute that is invoked expressly so provides.[5]

It has been expressly held that corporations are not dissolved by

[1] Boston Glass Manufactory *v.* Langdon, 24 Pick. 49; see also Olds *v.* Company (Mass.), 70 N. E. 1022.

[2] Everetts *v.* Company, 20 Conn. 448; Rorke *v.* Thomas, 56 N. Y. 559; People *v.* Ballard, 134 N. Y. 269; 32 N. E. 54; Commonwealth *v.* Silfer, 53 Pa. St. 71; Wilson *v.* Proprietors, etc., 9 R. I. 590; State *v.* Association, 35 O. St. 258.

[3] Commonwealth *v.* Slifer, 53 Pa. St. 71; *In re* Lincoln Co., 190 Pa. St. 124; 42 Atl. 538; Wilson *v.* Proprietors, etc., 9 R. I. 590.

[4] People *v.* B. & R. T. Road, 23 Wend. 222; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49; Kincaid *v.* Dwinelle, 59 N. Y. 548; Jones *v.* Edson, 10 Kan. Ap. 110; 62 Pac. 249; State *v.* Trustees, 5 Ind. 44; Wilmington & Reading Ry. Co. *v.* Downward (Del.), 14 Atl. 720; Muscatine Turnverein *v.* Funck, 18 Ia. 469; U. S. *v.* Company, 1 Fed. 700; Bradley *v.* McKee, 5 Cranch C. C. 298; Fed. Cases, No. 1784.

[5] Sprague Brimmer Mfg. Co. *v.* Company, 26 Fed. 572; Stolze *v.* Company, 100 Wis. 208; 75 N. W. 987; Olds *v.* Company (Mass.), 70 N. E. 1022.

statutory proceedings in bankruptcy or insolvency, or by appointment of receivers in equity or by assignment for the benefit of creditors.[1]

§ 115. **Forfeiture of Charters.** — At common law forfeiture of charters was accomplished by means of *scire facias*, or by an information by the proper State officials in the nature of a writ of *quo warranto*.[2] "An information for the purpose of dissolving a corporation or of seizing its franchises," it has been said, "cannot be brought except by the authority of the Commonwealth, exercised by the legislature or by the attorney or solicitor-general acting under its direction or *ex officio* in its behalf. For the Commonwealth may waive any provision of any condition, express or implied, on which the corporation was created; and courts cannot give judgment for the seizure by the Commonwealth of the franchises of any corporation unless the Commonwealth be a party in interest to the suit and assents to the judgment."[3]

A corporation cannot within the meaning of the law forfeit its rights and seal up the corporation. A corporation without rights, without legal capacity to do anything, not even to acquire rights, is an impossibility. It has never been seriously contended that mere non-performance of conditions subsequent on the part of a corporation has the effect *ex proprio vigore* to put an end to corporate life. By such non-performance the corporation is not *ipso facto* dissolved or deprived of its corporate existence or corporate rights, but it is simply exposed to proceedings in behalf of the State to establish and enforce a forfeiture. The State which gave the corporate life may take it away. The State which imposed the conditions may waive their performance, and the corporate life may run on until the State by proper proceedings (ordinarily *quo warranto*, or in the nature of *quo warranto*) interposes and enforces a forfeiture.[4]

Courts of equity have no inherent jurisdiction, in the absence of statute conferring the same, to decree a dissolution of a corporation or declare a forfeiture of its charter on any grounds.[5]

[1] Chamberlain *v.* Company, 118 Mass. 532; Taylor *v.* Company, 14 Allen (Mass.), 353; Montgomery *v.* Merrill, 18 Mich. 338; Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49; Central Nat. Bank *v.* Company, 104 U. S. 54.

[2] Rex *v.* Passmore, 3 Term Reports, 199; Slee *v.* Bloom, 5 Johnson's Chan. N. Y. 366; W. & B. T. Co. *v.* Maryland, 19 Md. 239.

[3] Commonwealth *v.* Company, 5 Mass. 230.

[4] Matter of Brooklyn Elevated Ry. Co., 125 N. Y. 434; 26 N. E. 474.

[5] Wheeler *v.* Company, 143 Ill. 197; 32 N. E. 420; Denike *v.* Company, 80

The principal grounds under the statute upon which charters will be forfeited may be enumerated as follows: (1) non-user of corporate franchises; (2) mis-user or abuse of corporate powers; (3) for non-performance of conditions precedent to valid existence as a corporation; (4) for non-performance of conditions subsequent to valid continuance of existence as a corporation; (5) for violation of express statutes; (6) for non-payment of taxes; (7) for insolvency. These will now be taken up briefly for separate consideration.

(1) *Forfeiture for non-user of corporate franchises.* It is a well-established doctrine of the law that courts should proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises; nor should such a penalty be visited except for plain abuse of power by which the corporation fails to fulfil the designs and purposes of its organization.[1] Again it has been well said: "It is not every failure to perform a duty imposed that will work a forfeiture. It must be something more than accidental negligence, something more than an excess of power, something more than a mere mistake in the mode of executing the acknowledged powers; and though a single act of simple non-feasance may be a ground of forfeiture, a specific act of non-feasance not committed wilfully and not producing or tending to produce mischievous consequences to any one, and not being contrary to formal regulations of the charter, will not be."[2]

All these judicial utterances are little more than a declaration of the fact that the policy of the State, of its officers and courts should be to encourage in all legitimate ways the organization and operation of all corporations organized to promote any legitimate enterprise. "The rights, privileges, and franchises of such corporations," it has been well said, "should not be declared forfeited, and they should not be ousted and excluded therefrom, except for solid, weighty, and cogent reasons, for the violation of a positive or prohibitory statute and not of a statute whose provisions are permissive and apparently directory, and never upon mere technical grounds."[3]

The term "forfeiture of charter for non-user of corporate franchises," as here used, has a very broad signification. It

N. Y. 599. See however Miner *v.* Company, 93 Mich. 97; Arents *v.* Company, 101 Fed. 138.

[1] State *v.* Chemical Bank, 10 O. St. 535.
[2] State *v.* Company, 8 R. I. 182.
[3] Moore *v.* State, 71 Ind. 478.

may have reference to action taken by the State with a view to forfeiture of corporate charters on any one of the following grounds: failure to organize the corporation within the time prescribed by statute;[1] failure to carry on the business enumerated in its articles;[2] failure to elect officers;[3] failure to maintain domiciliary office within the State;[4] failure to commence business within the time designated by statute.[5]

(2) *Forfeiture for misuse or abuse of corporate powers.* "To work a forfeiture on the ground of misuser or abuse of corporate powers, there should not only be a wrong, but one arising from wilful abuse or improper neglect. The corporate default must be something more than accidental negligence or mere mistaken excess of power, or mistake in the mode of exercising an acknowledged power. There must be an abuse of trust, of such a nature as would render a trustee liable to forfeit his station on the complaint of his *cestui que trust* if the question stood on the relation between them. Corporations are political trustees. Have they fulfilled the purposes of their trust or acted in good faith with a view to fulfilment? is the question to be asked when they are called upon to forfeit their charter, either for acts of commission or omission."[6]

"It appears to be settled," observed the New York Court of Appeals, "that the State as prosecutor must show on the part of the corporation accused some act against the law of its being which has produced or tends to produce injury to the public. The transgression must not be merely formal or accidental, but material and serious, and such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but interferes only where some public interest requires its action. Corporations may and often do exceed their authority where only private rights are affected. But when the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchises or the violation of its corporate duty."[7]

[1] State *v.* Simonton, 78 N. C. 57.
[2] W. C. M. Co. *v.* Burns, 114 N. C. 353; 19 S. E. 238.
[3] State *v.* Barron, 58 N. H. 370.
[4] State *v.* Company, 58 Minn. 330; 59 N. W. 1048; State *v.* Company, 59 Kan. 151; 52 Pac. 422; State *v.* Company, 45 Wis. 579.
[5] W. F. C. F. Co. *v.* Kittridge, 5 Saw. 44; People *v.* Bank, 129 Ill. 618; 22 N. E. 288.
[6] People *v.* B. & R. T. Road, 23 Wend. 222.
[7] People *v.* Company, 121 N. Y. 582; 24 N. E. 834; see also M. O. & R. R. Co. *v.* Cross, 20 Ark. 443.

(3) *Forfeiture for non-performance of conditions precedent.* Even a corporation defectively organized may have what is termed a "*de facto* existence," so that it cannot ordinarily be impeached by parties other than the State. Nevertheless the right to bring proceedings to forfeit the charter of such corporation vests with the State which may bring proceedings to forfeit the same and oust it from the exercise of corporate powers.[1]

(4) *Forfeiture for non-performance of conditions subsequent.* It has been well settled that charters of corporations may be forfeited by proper action brought by the State for failure to comply with conditions subsequent which are clearly mandatory and not merely directory in their nature.[2]

(5) *Forfeiture for violation of express statute.* This is one of the clearest grounds for the exercise by the State of its right to forfeit charters. The most common ground for the exercise thereof is in connection with anti-trust legislation.[3]

(6) *Forfeiture for non-payment of taxes.* Several of the States authorize forfeiture of charters for non-payment of organization and annual franchise taxes. This right has been exercised with great frequency, and constitutes unquestionably a valid exercise of the power of such legislature over corporations.[4]

(7) *Forfeiture for insolvency.* In the absence of statutory provision to that effect, insolvency alone will not authorize the State to forfeit corporate charters.[5] However, it is unquestionably valid for a State to prescribe that if a corporation be insolvent for a certain length of time it shall constitute a forfeiture of its charter.[6]

§ 116. **The Police Power of the State.** — The police power of the State comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and

[1] Holman *v.* State, 105 Ind. 569; People *v.* City Bank, 7 Col. 226; 3 Pac. 214.

[2] State *v.* Company, 1 Tenn. Cases, 511; People *v.* Company, 131 N. Y. 140; Hammond *v.* Strauss, 53 Md. 1.

[3] Simmons *v.* Company, 113 N. C. 147; State *v.* Company, 24 Texas, 80; Huyler *v.* Company, 40 N. J. Eq. 392; People *v.* Company, 60 How. Pr. 82; People *v.* Company, 130 Ill. 268; State *v.* Standard Oil Co., 49 O. St. 137; People *v.* Company, 121 N. Y. 582; see also People *v.* Chambers, 42 Cal. 201; People *v.* Bank, 129 Ill. 618; 22 N. E. 288; 24 N. E. 834.

[4] Hughesdale Mfg. Co. *v.* Vanner, 12 R. I. 491; Bank *v.* Company, 17 Ap. Div. (N. Y.) 524.

[5] People *v.* Bank, 6 Cowen (N. Y.), 211; A. & L. T. Co. *v.* Holthouse, 7 Ind. 59; State *v.* Bank, 13 Smeads & M. (Miss.) 569; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574.

[6] People *v.* Bank, 12 Mich. 526; C. M. L. & I. Ass'n *v.* Hunt, 127 Ill. 257; Denike *v.* Company, 80 N. Y. 599.

comfort of society, but the proper limit in its bearing upon charter rights and privileges of private corporations for public uses would seem to be this: That the legislature may at all times regulate the exercise of the corporate franchises by general laws passed in good faith for the legitimate ends contemplated by State police power; that is, for peace, good order, health, comfort, and welfare of society; but it cannot under the color of such laws destroy or impair the franchises itself, or any of the rights or powers which are essential to the exercise of it.[1]

After the decision of the United States Supreme Court in Dartmouth College *v.* Woodward,[2] that court proceeded to enunciate the doctrine that in the exercise of what is termed "police power," the several States might pass laws as a valid exercise of such powers when otherwise they would be forbidden to do so under Section 10, Article 1, of the Constitution of the United States, which forbids the impairing of the obligations of contracts by means of laws enacted by them.

The police power arises primarily from the nature of the social contract, just as when each person upon becoming a member of a society must of necessity relinquish some of the rights and privileges which, as an individual and considered alone, he might retain. The Supreme Court of Massachusetts in Commonwealth *v.* Alger[3] says: "All property is subject to such reasonable restrictions and regulations established by law as the legislature under the governing and controlling power vested in them by the Constitution may think necessary and expedient."

In Gibbons *v.* Ogden[4] the United States Supreme Court held that the police power is lodged with the several States. In Providence Bank *v.* Billings[5] the court took another step forward, and held that the abandonment on the part of the State of its power of regulation in this regard ought never to be presumed in any case where the purpose of the State to abandon it does not clearly appear.

In the License Cases[6] the court held that, in the exercise of its police power, a State may pass quarantine and sanitary laws damaging and even destroying property in some cases. In Bartemeyer *v.* Iowa[7] the court held that a State law prohibiting the manufac-

[1] P. W. B. R. R. Co. *v.* Bowers, 4 Houston, Del. 506.

[2] 4 Wheat. 518.

[3] 7 Cush. 84.

[4] 9 Wheat. 1.

[5] 4 Peters, 514.

[6] 5 Howard, 404.

[7] 18 Wal. 133.

ture and sale of intoxicating liquors was a valid exercise of the police power. In Beer Company *v.* Massachusetts[1] the court held that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.

In Mugler *v.* Kansas[2] it was held that a State may absolutely prohibit the manufacture and sale of intoxicating liquors as a beverage, and may declare places where such liquors are manufactured or sold to be nuisances, and may authorize the destruction of such liquors found therein, and of all property used in keeping and manufacturing such nuisances. Such a statute is valid as to such liquors lawfully manufactured before the enactment of the statute, and although it greatly deteriorates the value of the property lawfully used in such manufacture before the enactment of the statute.

In Munn *v.* Illinois[3] it was held that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good as long as he maintains the use.

In Fertilizing Company *v.* Hyde Park[4] the right of State authorities to compel the removal of a bone fertilizing business from a location near the village to a point farther removed, was held to be valid as an exercise of the police power.

In the Slaughter House Cases[5] the court held that the power of State legislatures to make a contract of such a character that under the provisions of the Constitution it cannot be modified or abrogated does not extend to subjects affecting public health and public morals, so as to limit the further exercise of legislative power over those subjects, to the prejudice of the general welfare.

To summarize briefly the general doctrine of the federal Supreme Court on this subject, the same may be done by presenting the following abstract propositions:

(1) Laws for the welfare and safety of a community being essential to the existence of every State, it cannot be supposed to have been within the intention of the original thirteen States to limit this power by assenting to the Federal Constitution.[6]

[1] 97 U. S. 25.
[2] 123 U. S. 623.
[3] 94 U. S. 113.
[4] 97 U. S. 659.
[5] 111 U. S. 746.
[6] Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677; 40 L. E. 849.

(2) Generally speaking, the extent to which a State can regulate the business or affairs of a corporation depends upon the nature of the business — whether it affects the public closely or remotely. If it is of such a character or magnitude that the public are directly interested in its proper management, then it falls within the proper sphere of legislative control.[1]

(3) Being an inherent right as well as a duty, the legislature may pass enactments looking towards the safety of life and property, and general laws of this nature are a legitimate exercise of the "police power." Thus it may compel railroads to fence tracks, maintain cattle guards, put up signboards at crossings, construct viaducts, require all trains to stop at intersections of railroads, etc.[2]

(4) Laws intended to prevent or remove nuisances are clearly within the "police power" of the State.[3]

(5) A State may pass laws for the protection of its inhabitants against the evils of intemperance, even though existing contracts be affected thereby.[4]

(6) Laws regulating the employment of persons of a certain age in manufactories are a valid exercise of the general power of the State to enact laws to secure the health and education of the community.[5]

(7) A State may by statute protect the interest of employees when the common law affords no protection; as for example, a law providing that all railroad companies shall be liable for wages due to day laborers employed by contractors engaged to construct the company's railroad and works was held to be valid.[6]

(8) A State may by general laws regulate the use and disposition of property within its jurisdiction, although existing incorporated companies be thereby affected.[7]

(9) A State may pass laws for the protection of the morals

[1] Munn *v.* Illinois, 94 U. S. 113; 24 L. E. 77; Pearsall *v.* Company, 161 U. S. 646; 40 L. E. 838.
[2] Reid *v.* Colorado, 187 U. S. 137; 47 L. E. 108; Smith *v.* Company, 181 U. S. 248; 45 L. E. 847.
[3] Slaughter House Cases, 16 Wall. 36; 21 L. E. 394.
[4] Reymann Brewing Co. *v.* Brister, 179 U. S. 445; 45 L. E. 269; Rhodes *v.* State of Iowa, 170 U. S. 412; 42 L. E. 1088; Foster *v.* Kansas, 112 U. S. 201; 28 L. E. 629; Mugler *v.* Kansas, 123 U. S. 623.
[5] Knoxville Iron Co. *v.* Harbison, 183 U. S. 13; 46 L. E. 55.
[6] Knoxville Iron Co. *v.* Harbison, 183 U. S. 13; 46 L. E. 55; Butchers' Union, etc. *v.* Company, 111 U. S. 746; 28 L. E. 585; Dent *v.* West Virginia, 129 U. S. 114; 32 L. E. 623; Holden *v.* Hardy, 169 U. S. 366; 42 L. E. 780.
[7] Budd *v.* New York, 143 U. S. 517; 36 L. E. 247.

of its citizens, even though vested corporate rights be thereby affected.[1]

§ 117. **Legislative Investigation into Corporate Affairs.** — The statutes of California, Michigan, Minnesota, North Dakota, Oklahoma, South Dakota, and Wisconsin contain express provisions for the appointment of legislative committees to examine into the affairs of corporations organized under their laws. The provisions of the South Dakota act may be quoted as exemplifying the nature of such statutory provision. It reads as follows:

"The legislative assembly, or either branch thereof, may examine into the affairs and condition of any corporation in this State at all times; and for that purpose any committee appointed by the said assembly, or either branch thereof, may administer all necessary oaths to the directors, officers, and stockholders of such corporation, and may examine them on oath in relation to the affairs and conditions thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of all keys, books, papers, and documents by summary process, to be issued on application to any circuit court or any judge thereof, under such rules and regulations as the court may prescribe." [2]

Such an inquiry as is authorized by the statutes just referred to has been held not to constitute a judicial act, and is therefore considered a valid exercise of legislative powers.[3] On this particular subject the Supreme Court of Massachusetts spoke as follows:

"The inquiry into the affairs or defaults of a corporation with a view to continue or discontinue it, is not a judicial act. No issue is framed. No decree or judgment is passed. No forfeiture is adjudged. No fine or imprisonment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertaining facts upon which to exert legislative power or to learn whether a contingency has happened upon which legislative action is required."[4]

§ 118. **Legislative Requirement of Annual Reports from Corporations.** — Statutes exist in thirty-three of the Commonwealths

[1] Austin *v.* Tennessee, 179 U. S. 343; 45 L. E. 224; Petit *v.* Minnesota, 177 U. S. 164; 4 L. E. 716; Hannington *v.* Georgia, 161 U. S. 299; 41 L. E. 166; L'Hote *v.* New Orleans, 77 U. S. 587; 44 L. E. 899.

[2] Sec. 478, Rev. Civ. Code; sec. 2970, Comp. L.

[3] Lothrop *v.* Stedman, 42 Conn. 583; Fed. Cas. No. 8519.

[4] Crease *v.* Babcock, 23 Pick. 344.

requiring annual reports from domestic corporations.[1] The validity of such statutes was considered by the Supreme Court in the case of Eagle Insurance Company *v.* State of Ohio.[2] The court in its opinion therein spoke as follows:

"The right of the plaintiff in error to exist as a corporation and its authority in that capacity to conduct the particular business for which it was created were granted subject to the condition that the privileges and franchises conferred upon it should not be abused or so employed as to defeat the ends for which it was established, and that when so abused or misemployed they might be withdrawn or reclaimed by the State in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the plaintiff's charter, it is implied in every grant of corporate existence. Equally implied in our judgment is the condition that the corporation shall be subject to such reasonable regulations in respect to the general conduct of its powers as the legislature may from time to time prescribe which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted only to secure the ends for which the corporation was created. If this condition be not implied, then the creation of corporations with rights and privileges which do not belong to individual citizens may become dangerous to the public welfare through the ignorance or misconduct or fraud of those to whose management their affairs are entrusted. It would be extraordinary for the legislative department of a government, charged with the duty of enacting such laws as may promote the health or morals or prosperity of the people might not when unrestrained by constitutional limitations upon its authority, provide by reasonable regulations against the misuse of special corporate privileges which it has granted, and which could not except by its sanction, express or implied, have been exercised at all."

The conclusion of the court in the case just referred to was that the charter of the corporation did not exempt it from obligations to comply with the subsequently established police regulations of the State, requiring certain corporations to make annual statements of their condition.

§ 119. **Inspection of Corporate Books.** — In all the Commonwealths but five statutes have been enacted requiring the keeping of certain corporate books and giving to stockholders, and sometimes to creditors as well, the right to inspect the same. At

[1] See Part III. Table 7, page 577.

[2] 153 U. S. 446.

common law stockholders had the right to inspect books and papers of the corporation at reasonable times and for a proper purpose.[1] Creditors had no such common law rights.

On this subject the New York Court of Appeals in the Matter of Steinway[2] spoke as follows:

"The elementary works unite in holding that the incorporator has the right in question and that mandamus is the proper remedy. We think that according to the decided weight of authority a stockholder has the right at common law to inspect the books of his corporation at a proper time and place and for a proper purpose, and that if this right is refused by the officers in charge, writ of mandamus may issue in the sound discretion of the court with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small, but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court but the writ to issue as a matter of course, although even then doubtless due precautions may be taken as to time and place so as to prevent interruption of business, or other serious inconvenience. We do not think, however, that the statute now in force in this State is exclusive, or that it has abridged the common law right of stockholders with reference to the examination of the corporate books. By enabling the stockholder to get some information in a new way, it did not impliedly repeal the common law rule, which enabled him to get other information in another way, for the courts do not hold the common law to be repealed by implication unless the intention is obvious. By simply providing an additional remedy the existing remedy was not taken away. The statute merely strengthens the common law rule with reference to one part thereof, and left the remainder intact."

The right of inspection of corporate books is not the inspection of the idle, the impertinent, or the curious, but an inspection with a laudable object to accomplish, or a real and actual interest upon which is predicated the request for information disclosed by the books.[3]

[1] People *v.* Eadie, 63 Hun, 320; 133 N. Y. 573; Burham *v.* Company, 76 Cal. 24; 17 Pac. 940; Phœnix Iron Co. *v.* Commonwealth, 113 Pa. St. 563; Hemingway *v.* Hemingway, 58 Conn. 443.

[2] 159 N. Y. 250.

[3] State *ex rel.* Bourdette *v.* Company, 49 La. Ann. 1556; 22 So. 815.

The purpose of requiring a copy of stock books and books of account at the corporation's domiciliary office is to protect the rights of stockholders and to aid the State in exercising its visitorial powers, or to enable creditors or stockholders to ascertain the number of shares standing in the names of each so as to levy execution and attachment thereon. The mere fact that a domestic corporation has kept its books in another State when required by law to keep its books at its domiciliary office, is not a ground for dissolving the corporation when parties entitled to inspection of such books have never been refused the right to inspect the same at the domiciliary office.[1]

§ 120. **Anti-Trust Legislation.** — The term "trust" includes any form of combination or combinations between corporations or between corporations and individuals for the purpose of regulating production and repressing competition by means of the power thus centralized.[2]

Under the common law agreements, pools, trusts, or combinations between persons or corporations looking towards any absolute restraint of trade or to regulate prices or to promote monopolies, were against public policy, and as such were unlawful and void. But when the question of public policy is at issue, certain matters should be noted.

It has been well said "that the public policy of the State varies from time to time. It is not to be measured by the private combination or combinations of the persons who happen to be exercising judicial functions, but by reference to the enactment of the law-making power, and in the absence of them to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the State."[3]

Congress dealt with illegal trade combinations in relation to interstate commerce as early as 1887, when it passed the Inter-State Commerce Act, and later on, July 2, 1890, it passed what is known as the "Sherman Anti-Trust Act." Since that time thirty-three of the States have passed more or less stringent anti-trust acts.[4] All this legislation has been framed with the same purpose.

[1] Ribling Stock Co. *v.* People, 147 Ill. 234; 35 N. E. 608.

[2] MacGinniss *v.* Company (Mont.), 75 Pac. 89.

[3] MacGinniss *v.* Company (Mont.), 75 Pac. 89; United States *v.* Association, 166 U. S. 290; 41 L. E. 1007.

[4] See Part III. Table 3, page 573.

In some of these acts an arbitrary distinction is made between dealers and producers. Such provisions have under certain circumstances been declared to be "class legislation," and as such are invalid under the Fourteenth Amendment to the Federal Constitution.

Under this principle the anti-trust acts of Illinois and Texas have recently been declared to be unconstitutional.[1]

In the note below will be found the dates of the passage of the earlier anti-trust acts in the several States.[2]

§ 121. **Regulation of Internal Affairs.** — In many of the States the regulation of the internal affairs of corporations has been largely delegated by statute to the corporations themselves. Such is the case in Alabama, Connecticut, Delaware, Iowa, Maryland, Massachusetts, New Jersey, Nebraska, New York, North Carolina, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wisconsin.

In other of the Commonwealths, without express provision of law permitting the same, State officials allow clauses for the regulation of the internal affairs of the corporation to be incorporated in articles of incorporation filed with them. As an

[1] Connolly *v.* Union S. P. Co., 184 U. S. 540; 46 L. E. 679; State *v.* Shippers & Compress Warehouse Co., 95 Texas, 603; 69 S. W. 58; Ford *v.* Association, 155 Ill. 166; 39 N. E. 651; Harding *v.* Company, 182 Ill. 551; 55 N. E. 577. See also Northern Securities Co. *v.* United States, 193 U. S. 197.

[2] The Federal Anti-Trust Act commonly known as "the Sherman Act" was approved July 2, 1890. The following is a list of the States wherein anti-trust legislation of a more or less comprehensive character was passed, together with the date the same went into effect:

Alabama, Insurance Act, Feb. 18, 1897; Arkansas, Anti-Trust Act, Mar. 16, 1897; California, Cattle Trust Act, Feb. 27, 1893; Delaware, Life Insurance Act, Feb. 15, 1891; Florida, Trade in Cattle, June 11, 1897; Georgia, Anti-Monopoly Act, Dec. 23, 1896; Illinois, Prohibitory Pools, Trusts, and Combinations, Original Act, July 11, 1891, amended June 10, 1897; Indiana, Mar. 5, 1897, General Anti-Trust; Iowa, General Anti-Trust, May 6, 1890; Kansas, Mar. 8, 1897, defines a trust in five sections; Kentucky, General, May 20, 1890; Louisiana, General went into effect July 7, 1892; Maine, General, Mar. 7, 1889; Michigan, became a law July 1, 1889; Minnesota, April 20, 1891; Mississippi, Part of the Code of the General St. Laws of Mississippi adopted in 1892, and amended March 11, 1896; Missouri, Original Act, April 2, 1891, revised under Act of April 11, 1895, and revised again March 24, 1897; Montana, Annotated Code of 1895, secs. 321–325; Nebraska, Act of April 8, 1897; New Mexico, Feb. 4, 1891; New York, May 7, 1897; North Carolina, March 11, 1889; North Dakota, March 9, 1897; Oklahoma, Dec. 25, 1890; South Carolina, Feb. 25, 1897; South Dakota, March, 1, 1897; Tennessee, April 6, 1889 amended March 30, 1891; Texas, Original Act, March 30, 1889, amended April 30, 1895; Utah, March 9, 1896; Washington, Con., Art. XII. sec. 22, and also Act of March 21, 1895, Session Laws, 1895, chap. cxlviii.; Wisconsin, April 27, 1897. (See "Biography of Commercial Trusts," by Wm. H. Winters, Librarian of the N. Y. Law Institute in 1890.)

example of the statutes above referred to, attention is called to the provisions of the New Jersey Act, which reads as follows:

"The certificate of incorporation may also contain any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting, and regulating the powers of the corporation, the directors, and the stockholders or any class or classes of stockholders." [1]

Without such statutory authority State officials are unquestionably justified in refusing to allow articles of incorporation to be filed containing such clauses as are here referred to.[2]

The Court of Appeals of New York in an early case, commenting upon the legal effect of the insertion of provisions in the articles not authorized by the incorporation act, spoke as follows:

"The want of authority for this provision would not affect the validity of the corporation. The articles must contain the statements affirmatively required by the act, because those statements constitute the conditions precedent to the right of the company to become incorporated. If unauthorized provisions are added, all the acts done pursuant to such provisions will be void, but until the company is proceeded against for abuse of its franchises its rights as a corporation will not be affected by such unauthorized provisions." [3]

The more modern view in regard to such matters is that where State officials are either expressly or impliedly empowered to pass upon the validity of articles of incorporation submitted to them with a view to filing in their office, the approval of such State official once obtained renders such clauses as are here referred to valid as against all but the State, even when their insertion in the articles is not expressly authorized.[4]

§ 122. **Liability of Stockholders for Debts of the Corporation.** — The general subject of stockholders' liability may be best discussed under three heads: (*a*) Liability for unpaid stock subscriptions; (*b*) Double liability as established by statute in certain

[1] New Jersey Session Laws of 1896, chap. 185, sec. 8, subdivision 7.

[2] *In re* Stevedores' Beneficial Ass'n, 14 Phila. Pa. 130; see *ante*, sec. 5.

[3] Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 551.

[4] See *ante*, sec. 6.

States; (*c*) Special liability as established by statute in certain States.

(*a*) Liability for unpaid stock subscription. The statutes which exist in nearly every Commonwealth in the Union making stockholders liable for unpaid stock subscriptions are merely declaratory of the common law.[1] The liability of stockholders of corporations for unpaid stock subscriptions with reference to creditors is oftentimes confused with their liability to the corporation itself. The latter liability is directory and the right to enforce it may be waived by the corporation. In the absence of such waiver the subscribing stockholders are bound by the contract of subscription to pay the full value of their shares in such instalments and in such manner as may be prescribed by the laws of the State or by-laws of the corporation. In such cases the liability may be enforced by the ordinary remedies. The corporation usually has a lien upon the stock, and may sell the same in satisfaction of the debt, and may collect the deficiency, if any, by action against the delinquent stockholders.

On the other hand, as the corporation is a legal entity distinct from the stockholders who constitute it, no debts or obligations incurred by it can, in the absence of a direct statutory provision, impose any lawful liability upon the stockholders. But in equity, under what is termed the "trust fund doctrine," the debts of the stockholders to the corporation are regarded as equitable assets of the corporation and may be reached by the creditors if the legal assets prove insufficient. This trust fund doctrine derives its main support at the present time from the Supreme Court of the United States, but it has secured recognition in many jurisdictions.

As stated in Sanger *v.* Upton,[2] "The capital stock of an incorporated company is a fund set apart for payment of its debts. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company as the cash which has been paid in.

"The stockholders thus become individually liable for the debts of the corporation, to the extent of the unpaid balance on their stock. They are also in some States subject to other statutory liabilities hereinafter set forth. The statutory remedy is usually by equitable action, but in some States by an action at law.

[1] Taylor *v.* Cummings, 127 Fed. 108. [2] 91 U. S. 60.

Under nearly all such statutory provisions, the liability of stockholders is intended merely as a secondary security for creditors in case the assets of the corporation are insufficient to meet its debts, but in special cases stockholders may be made parties defendant in an original action, and if they are obliged to pay any debt of the corporation they may bring an action against the corporation for the amount so paid, and are usually entitled also to exact contribution from the other stockholders."

The only other questions which are of practical importance in connection with the present subject may be restricted to two classes: one relates to the liability for unpaid stock subscriptions to creditors as between the transferor and the transferee, and the other relates to the liability to creditors of pledgees and trustees of stock.

With reference to the first question it may be said that the question depends upon the law of the State in which the stockholder may reside and in which action may be brought.[1] In most States transferors of stock are not subject to stockholders' liability, and are thereafter released from liability for assessments made by the corporation.[2]

In the absence of statutory provision to the contrary, a *bona fide* transfer of stock perfected on the books of the corporation, discharges the transferor from any further liability either to the corporation or to creditors for calls made after the transfer and for calls made prior thereto, and the transferee takes his place and becomes liable for calls made after the transfer but not for calls made before.[3] The distinction which clearly obtains between one who holds his stock by transfer and one who is an original subscriber to the stock of the corporation, must be carefully noted. The former may in good faith discharge himself from liability for unpaid instalments by due transfer of his shares, while the latter cannot obtain immunity in this way. The subscriptions for stock and the acceptance of a certificate for the shares constitute a contract between the subscriber and the corporation by which he engages to pay the remaining instalments on demand from the corporation. From this agreement the subscriber cannot recede without the consent of the corporation.[4] In some of the States

[1] Glenn *v.* Hunt, 120 Mo. 330; 25 S. W. 181.
[2] M. L. T. Co. *v.* Ward, 13 Ohio, 120.
[3] Pullman *v.* Upton, 96 U. S. 328; see also Sigua Iron Co. *v.* Brown, 171 N. Y. 488; 64 N. E. 194.
[4] Hood *v.* McNaughton, 54 N. J. Law, 425; 24 Atl. 497.

this matter is regulated by statute. In Maine, Massachusetts, North Carolina, West Virginia, the original subscriber alone is liable. In Illinois, Iowa, Nebraska, New Hampshire, Rhode Island, and Virginia the original subscriber remains liable as well as the transferee.[1] In Georgia, Ohio, Tennessee, and Oregon the original subscriber is liable upon default in payment by the transferee. In Mississippi and Wisconsin the original subscriber remains liable for the debts contracted before his ownership or those contracted thereafter. In California, Indiana, Kentucky, Maryland, Michigan, Minnesota, New York, and Tennessee the original subscriber remains liable for the debts of the corporation contracted during his ownership and not for debts contracted after such transfer. In Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming upon the transfer of stock the transferee becomes liable for all debts contracted both before and after transfer, and the transferor is discharged in all these States as to debts contracted after such transfer, and in some of these States from liability for debts contracted before such transfer as well.[2]

Turning now to the question of liability of pledgees and trustees of stock, it may be said that unless protected by statute, as is the case in New York, Missouri, California, and Michigan, the prevailing rule seems to be that pledgees and trustees of stock are liable thereon to the extent of the unpaid portion of the stock held by them.[3]

On the other hand the Supreme Court of the United States has enunciated a different doctrine to the effect that a pledgee of stock taken as collateral security or as a loan is not subject to personal liability for the debts of the corporation imposed on other shareholders unless he has either become the owner of the shares in fact or has held himself out to be the owner, and thereby estopped himself from denying his personal liability as such.[4]

[1] White *v.* Greene (Iowa), 70 N. W. 182; Sprague *v.* Bank, 172 Ill. 149; 50 N. E. 190.

[2] Van Cott *v.* Van Brunt, 82 N. Y. 535.

[3] Hole *v.* Walker, 31 Ia. 344; Union Savings Ass'n *v.* Seligman, 92 Mo. 635; 65 S. W. 630; Germania National Bank *v.* Case, 99 U. S. 628; McMahon *v.* Macy, 51 N. Y. 155.

[4] Rankin *v.* F. I. T. & D. Co., 189 U. S. 242.

(*b*) Double liability as established by statute in certain States. What is known as the "double liability" of stockholders for debts of the corporation which existed formerly in a large number of States, has now been so far removed by statute that it exists at the present time in the case of ordinary business corporations in only two States, to wit, California and Minnesota.[1] In the last-mentioned State it does not exist in the case of corporations organized exclusively for the purpose of carrying on a manufacturing, mining, or mechanical business.[2]

(*c*) Special liability as established by statute in certain States. Stockholders at common law were not liable for debts of the corporation beyond their liability for unpaid stock subscriptions.[3] Personal responsibility of stockholders is inconsistent with the conception of corporate liability at common law, and for this reason, if it exists at all, must rest upon some positive statute.[4]

The particular liability under consideration here arises by reason of the existence of statutory provisions that may be stated as follows: Liability of incorporators as partners through failure to legally organize the corporation. In Florida, Iowa, Minnesota, Nebraska, and Wisconsin stockholders are individually liable by statute for failure to comply with certain prescribed regulations in regard to organization and publicity.[5] In a few of the States the courts construe the liability of incorporators where they have failed to legally organize the corporation, not as partners at all. This on the ground that no such relationship or liability is contemplated by the incorporators, and that the creditors' only remedy is against the officers and agents who actually made the contract.[6]

In Indiana, Massachusetts, Michigan, New York, North Dakota,

[1] The liability may possibly still exist in Indiana and Kansas; see pages 257, 265.

[2] Sacramento Bank *v.* Pacific Bank, 124 Cal. 147; 56 Pac. 787; Danielson *v.* Yoakum, 116 Cal. 382; 48 Pac. 322; N. H. H. N. Co. *v.* Company, 142 Mass. 349; 7 N. E. 773; Bates *v.* Day, 198 Pa. St. 513; 48 Atl. 407; Whitman *v.* Bank, 176 U. S. 559; Willis *v.* Mabon, 48 Minn. 140; 50 N. W. 1110; Marshall *v.* Sherman, 148 N. Y. 9; 42 N. E. 419; Tuttle *v.* National Bank, 161 Ill. 497; 44 N. E. 984.

[3] Toner *v.* Faulkerson, 125 Ind. 224; 25 N. E. 218; Hood *v.* McNaughton, 54 N. J. L. 425; 24 Atl. 497.

[4] S. L. C. N. Bank *v.* Hendrickson, 40 N. J. Law, 52; Ciar *v.* Iglehart, 3 O. St. 457.

[5] Kaiser *v.* Bank, 56 Iowa, 104; 8 N. W. 772; Fuller *v.* Rowe, 57 N. Y. 23; Connor *v.* Abbot, 35 Ark. 366; Johnson *v.* Corser, 34 Minn. 355; 25 N. W. 799; Hurt *v.* Salisbury, 55 Mo. 310; Bergeron *v.* Hobbs, 96 Wis. 641; 71 N. W. 1056; Clegg *v.* Company, 61 Iowa, 121; 15 N. W. 365; Slocum *v.* Head, 105 Wis. 431; 81 N. W. 673.

[6] Ward *v.* Brigham, 127 Mass. 24; Rutherford *v.* Hill, 22 Ore. 218; 25 Pac. 546; Canfield *v.* Gregory, 66 Conn. 9; 33 Atl. 536; Bank *v.* Hall, 35 O. St. 158.

Oklahoma, Pennsylvania, South Dakota, Tennessee, and Wisconsin they are liable for the wages of employees of the corporation. In New York, in what is known as full liability corporations, stockholders are liable for debts of the corporation in full. In Arkansas, Delaware, Iowa, Maine, Michigan, Minnesota, New Hampshire, New Jersey, North Carolina, Vermont, and West Virginia stockholders are individually liable to the extent of any part of the corporate assets refunded to them respectively. In Idaho, Minnesota, North Carolina, and South Carolina stockholders are individually liable for any fraud or misconduct on their part. In Arizona, Delaware, Iowa, and Nebraska stockholders are personally liable for the debts of the corporation, unless they limit this liability by provision therefor in the charter.[1]

§ 123. **Statutory Liability of Directors.**— With the exception of a very limited number of States, all of the Commonwealths have statutes, either civil or penal, imposing liability upon directors for certain designated acts of misfeasance or nonfeasance. These statutes are diverse both in scope and character. It will only be possible in this connection to enumerate without discussion the several liabilities thus imposed upon directors.

(1) For illegal declaration of dividends.[2]

(2) For illegal withdrawal of capital stock.[3]

(3) For making false reports, or keeping false books of account, or making false representations.[4]

[1] Van Pelt *v.* Gardner, 54 Neb. 701; 75 N. W. 974.

[2] Such liability exists in Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Dykman *v.* Keeney, 160 N. Y. 677; 54 N. E. 1090; Chamberlain *v.* Company, 118 Mass. 552; Pittsburg, etc. R. R. Co. *v.* Allegheny Co., 63 Pa. St. 126.

[3] Such liability exists in Alaska, California, Connecticut, Georgia, Idaho, Iowa, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, South Dakota, Washington, and West Virginia.

[4] Such liability exists in Delaware, District of Columbia, Indiana, Kentucky, Montana, Nevada, New Hampshire, New York, Rhode Island, South Carolina, Tennessee, and Virginia. See Huntington *v.* Attrill, 118 N. Y. 365; 23 N. E. 544; Gidding *v.* Holter, 19 Mont. 263; 48 Pac. 8; Felker *v.* Company, 148 Mass. 226; 19 N. E. 225; Githers *v.* Clarke, 158 Pa. St. 616; 28 Atl. 232; Thompson Houston Electric Co. *v.* Murray, 60 N. J. L. 20; 37 Atl. 443.

(4) For failure to file annual reports.[1]

(5) For violation of express statutes.[2]

(6) For authorizing the contraction of debts in excess of the amount limited by law.[3]

(7) For contracting debts before statutory requirements, such as subscriptions for stock, either in whole or in part, publication of articles, etc., have been complied with.[4]

(8) For failure to file certificates as to reduction of capital stock.[5]

(9) For false oaths to articles of incorporation.[6]

(10) For making loans to directors.[7]

(11) For making loans to stockholders.[8]

(12) For loss of funds through negligence.[9]

(13) For failure to display name or itemized accounts at domiciliary office.[10]

(14) For failure to allow inspection of books.[11]

[1] Such liability exists in Colorado, Michigan, Montana, New Hampshire, New York, and Oklahoma. See Garrison *v.* Howe, 17 N. Y. 458; Van Etten *v.* Eaton, 19 Mich. 187; Shanklin *v.* Gray, 111 Cal. 88; 43 Pac. 399; Cincinnati Cooperage Co. *v.* O'Keeffe, 120 N. Y. 603; 24 N. E. 993; Wallace *v.* Walsh, 125 N. Y. 26; 25 N. E. 1076; Glenn Falls Paper Co. *v.* White, 18 Hun (N. Y.), 214; Bolen *v.* Crosby, 49 N. Y. 183; Tabor *v.* Bank, 62 Fed. 383; 10 C. C. A. 429.

[2] Such liability exists in Arkansas, Idaho, Indiana, Kentucky, Michigan, North Dakota, and South Dakota. See Patterson *v.* Stewart, 41 Minn. 84; 42 N. W. 926; Loverin *v.* McLaughlin, 161 Ill. 417; 44 N. E. 99; Clow *v.* Brown, 150 Ind. 185; 48 N. E. 1034; 49 N. E. 1057; Gunther *v.* Company, 21 Ky. L. Rep. 655; 52 S. W. 931.

[3] Such liability exists in California, Illinois, Idaho, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, Tennessee, Vermont, and Wyoming. See Tradesmen Pub. Co. *v.* Company, 95 Tenn. 634; 32 S. W. 1097; Lewis *v.* Montgomery, 145 Ill. 30; 33 N. E. 880; Hornor *v.* Henning, 93 U. S. 228.

[4] Such liability exists in Illinois, Ohio, Vermont, and Wisconsin. See Kent *v.* Clark, 181 Ill. 237; 54 N. E. 967; Clow *v.* Brown, 150 Ind. 185; 48 N. E. 1034; 49 N. E. 1057; Hequembourg *v.* Edwards, 155 Mo. 514; 55 S. W. 490; Loverin *v.* McLaughlin, 161 Ill. 417; 44 N. E. 99.

[5] Such liability exists in Indiana, New Jersey, and North Carolina.

[6] Such liability exists in Massachusetts.

[7] Such liability exists in Massachusetts and New York. See Thacher *v.* King, 156 Mass. 490; 31 N. E. 648; Connecticut River Bank *v.* Fiske, 62 N. H. 178; Witters *v.* Sowles, 31 Fed. 1.

[8] Such liability exists in District of Columbia, Mississippi, Missouri, New Hampshire, New York, Oklahoma, Rhode Island, and Tennessee. See Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460; Bank Commissioners *v.* Bank of Buffalo, 6 Paige (N. Y.), 497.

[9] Such liability exists in Minnesota. See Horn Silver Mining Co. *v.* Ryan, 42 Minn. 196; 44 N. W. 56; M. F. N. Bank *v.* Harper, 61 Minn. 375; 63 N. W. 1079.

[10] Such liability exists in California and New Jersey. See Eyre *v.* Harmon, 92 Cal. 580; 28 Pac. 779; Ball *v.* Toman, 119 Cal. 35; 51 Pac. 546.

[11] Such liability exists in New Jersey.

(15) For embezzlement of officers.[1]

(16) For failure to make certificate of payment of capital stock.[2]

(17) For making false appraisal as to value of property taken in exchange for corporate stock.[3]

(18) For not producing list of stockholders at the annual election of directors.[4]

(19) For permitting an illegal issue of stock or bonds.[5]

(20) For making prohibited transfers of property.[6]

(21) For issuing stock as full paid when less than its par value is paid thereon.[7]

§ 124. **Extension of Corporate Existence.** — In order to extend corporate existence special legislative action is necessary.[8] In nearly all of the States statutes exist providing that for a period of three years after the term of existence limited by its charter has expired, the corporation shall continue to exist for the purpose of winding up its affairs. Express power to extend corporate existence is granted in twenty-five of the Commonwealths.[9]

Where corporations are permitted under their charter to make their term of existence perpetual, this right to extend corporate existence is of very little practical importance. As, however, perpetual existence is permitted in only twenty-seven of the States, it is a question of much practical importance in the remainder. It has been held by at least one court of excellent repute that where the power of amendment of the charter is unlimited, even though it does not refer specifically to the right to extend corporate existence, it may nevertheless be used for that purpose.[10]

When so extended, it must pay an organization tax if the law

[1] Such liability exists in Colorado, New Mexico, and Pennsylvania. See Scott *v.* Depeyster, 1 Edw. Ch. (N. Y.) 513; Wallace *v.* Bank, 89 Tenn. 630; 13 S. W. 48; Ouderkirk *v.* Bank, 119 N. Y. 263; 23 N. E. 875.

[2] Such liability exists in Colorado, Delaware, Maryland, New Hampshire, North Carolina, and Rhode Island.

[3] Such liability exists in Connecticut. See Hequembourg *v.* Edwards, 155 Mo. 514; 56 S. W. 490; F. C. T. Co. *v.* Floyd, 47 O. St. 525; 26 N. E. 110.

[4] Such liability exists in Delaware and New Jersey.

[5] Such liability exists in North Dakota and New York. See Clow *v.* Brown, 150 Ind. 185; 48 N. E. 1034.

[6] Such liability exists in New York.

[7] Such liability exists in North Dakota. See Schley *v.* Dixon, 24 Ga. 273.

[8] People *v.* Pfister, 57 Cal. 532; Attorney-General *v.* Perkin, 73 Mich. 303; Smith *v.* Company, 58 N. J. Eq. 331; 43 Atl. 567; People *v.* Greene, 116 Mich. 505; 74 N. W. 714; Frostberg Mining Co. *v.* Company, 81 Md. 28; 31 Atl. 698.

[9] See Part III. Table 8, page 576.

[10] People *v.* Greene, 116 Mich. 505; 74 N. W. 714.

so provides, even though existence is extended under guise of an amendment.[1]

§ 125. **Taxation of Domestic Corporations.** — Legislative control over domestic corporations is exercised by means of the unquestioned right of such legislatures to impose a tax upon their organization and annually thereafter in the form of a franchise tax. The latter may be defined to be a tax levied by the State upon the capital of a corporation in return for the privilege of exercising its corporate powers within the limits of the State levying such tax. On the general subject of franchise tax the New York Court of Appeals in a recent case[2] spoke as follows:

"The system of taxation in this State is so complicated as to invite mistakes on the part of those who are called upon to enforce the law. In some instances the tax is laid upon property and in others upon rights and privileges connected with the property. There is direct taxation of real estate and of some personal property, indirect taxation of other personal property, taxation of the capital stock of corporations and of their franchises, taxation upon the right of succession to the property left by decedents, and the like. . . .

"There is, first, an organization tax, payable to the State, which is imposed but once, and is exacted for the privilege of becoming a corporation. Next, there is a tax upon the real estate owned by the corporation in this State, which is assessed the same as if it were owned by an individual. The personal property of the corporation is not directly taxed, but its capital stock and surplus after deducting the assessed value of its real estate and making some other deductions, is assessed at its actual value. Finally, there is a franchise tax on corporations which is payable annually to the State, 'computed upon the basis of the amount of its capital stock employed within this State.' This is not a tax upon property, although it is measured by the value of property, but upon the right of a corporation to exist and exercise the powers granted by its charter. These forms of taxation do not all rest upon the same principle. The organization tax is in the nature of a license fee for the right to become a corporation. The tax upon real estate is a direct tax upon real property, while the franchise tax is not laid upon property at all, but is imposed upon the corporation for the privilege of carrying on business in this State and exercising the corporate franchises granted by the State. The distinction between a tax upon the prop-

[1] Nl. Lead Co. *v.* Dickinson (N. J.), 57 Atl. 138.

[2] People *ex rel.* etc. *v.* Knight, 174 N. Y. 475; 67 N. E. 65.

erty of a corporation and a franchise tax, although well established and of great importance, is easily overlooked, as we find from our own experience."

With reference to organization taxes there can be no question raised as to the constitutionality of such taxation.[1]

The constitutionality of franchise taxes being imposed upon the franchise as a species of property is clearly within the constitutional powers of State legislatures.[2] In all of the States and Territories, with the exception of Alaska, Arkansas, District of Columbia, Georgia, Indian Territory, and Oklahoma, graduated organization taxes are imposed upon domestic corporations.

With respect to annual franchise taxes these are imposed only in the States of Alabama, Colorado, Delaware, Maine, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Washington, and West Virginia. In Alabama, Colorado, Maine, North Carolina, Oregon, South Carolina, Texas, Vermont, Virginia, Washington, and West Virginia the tax is levied upon the total amount of authorized capital stock, irrespective of the amount that may have been issued and outstanding.

In Delaware, Massachusetts, New Jersey, and Ohio the tax is graded according to the amount of capital stock issued and outstanding. In New York the tax is determined largely by the dividends on the par value of the amount of capital stock authorized. It is also graded on the amount of capital stock employed within the State.

§ 126. **Regulation of the Right of Consolidation.** — To accomplish a valid consolidation of two corporations that are organized under the laws of the same or of different States, legislative authority is necessary. It is not over-stating the matter to say that legislative authority is as necessary for the accomplishment of a valid consolidation of existing corporations as it is to the creation of a corporation in the first instance.[3] Any attempt, therefore, on the

[1] United Horseshoe Works *v.* Lewis, 1 Abb. (U. S.) 518; Fed. Cas. No. 14365; Combined Saw & Planer Co. *v.* Flournoy, 88 Va. 1029; 14 S. E. 976; State *v.* Rotwitt, 17 Mont. 41; 41 Pac. 1004; Hughesdale Mfg. Co. *v.* Vanner, 12 R. I. 491; Jones *v.* Company, 21 Col. 263; 40 Pac. 457.

[2] Society for Savings *v.* Coit, 6 Wall. (U. S.) 594; Tidewater Pipe Line Co. *v.* Berry, 53 N. J. L. 212; 21 Atl. 490; Attorney-General *v.* Bay State Mining Co., 99 Mass. 148.

[3] Pearce *v.* Company, 22 How. (U. S.) 441; A. L. & T. Co. *v.* Company, 157 Ill. 641; 42 N. E. 153; Cole *v.* Company, 133 N. Y. 164; 30 N. E. 847.

part of corporations to consolidate in the absence of any statute permitting consolidation will not be recognized by the courts.[1] Where power is granted to corporations to consolidate it is usually done by means of a general statute. Such statutes exist in a comparatively small number of the Commonwealths, the legislatures of the remaining States evidently looking upon consolidation as a form of a trust and therefore to be restricted.[2] Some of the statutes limit the right of consolidation to corporations of the same character or engaged in the same line of business.[3] Where the right to consolidate existed at the time the corporation was created it can ordinarily be affected by vote of a majority of the stockholders against the dissent of the minority.[4] However, in the absence of such authority conferred prior to the incorporation of a company, it has been held that consolidation cannot be affected against the dissent of the minority stockholders.[5]

When it comes to the matter of consolidation, creditors have no right to intervene for the purpose of preventing such a consolidation providing the same is undertaken under legislative authority. The remedy of creditors in such cases is to proceed in equity with a view to subjecting the property of the consolidated corporation to the payment of their claims.[6] Sometimes, though not always, when a new corporation is formed by the consolidation of a domestic corporation with a foreign corporation, it is required to pay an organization tax, at least upon so much of the capital stock as is represented by the capitalization of that of the consolidated domestic corporation.[7]

[1] Greenville Warehouse Press Co. *v.* Company, 70 Miss. 669; 13 So. 879.

[2] See Part III. Table 9, page 579.

[3] See *In re* Prospect Park & Coney Island Railway Co., 67 N. Y. 371.

[4] Spero *v.* Company, 7 Ind. 369; Sprague *v.* Company, 90 Ill. 174.

[5] Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; K. & R. I. Ry. Co. *v.* Marsh, 17 Wis. 13; Mowrey *v.* Company, 4 Bissell, 78; Fed. Cas. No. 9891.

[6] People *v.* Company, 92 N. Y. 105. See R. I. Ry. Co. *v.* Moffatt, 75 Ill. 524; N. D. Ry. Co. *v.* Company, 120 Mass. 397.

[7] State *v.* Sherman, 22 O. St. 411; P. Co. *v.* Company, 113 U. S. 296; A. & R. A. L. Co. *v.* State, 63 Ga. 2183; *contra*, People *v.* Company, 129 N. Y. 474; 29 N. E. 951.

CHAPTER VI.

LEGISLATIVE CONTROL OVER FOREIGN CORPORATIONS.

§ 127. **Extent of Legislative Power of the various Commonwealths over Foreign Corporations.** — A foreign corporation may be defined as one created under the laws of a State, Territory, government, or country other than that wherein it seeks to do business.[1] With some few exceptions nearly all of the Commonwealths have enacted statutes prescribing the terms and conditions upon which foreign corporations may carry on business within their borders.[2] Most of these statutes closely resemble each other in character, and generally look to the attainment of the same end. Thus, for example, in order to give courts of the foreign State jurisdiction over the foreign corporation and to secure proper protection for such of its citizens as may transact business with the latter, the statutes prescribe that foreign corporations shall designate an agent residing within the State upon whom service of process upon the corporation may be served, and also designate a place of business where it may be found. Such provisions are unquestionably valid.[3]

Again, most of the acts require that a certified or sworn copy of the charter of the foreign corporation shall be filed in certain designated offices, usually with the Secretary of State and in the local recording office of the county where its principal place of business is to be located. The object of such enactment is to furnish easily accessible evidence of the existence of the corporation, and to protect parties dealing with it from fraud and imposition.[4]

Still other States require the filing of reports enumerating the officers, giving information relative to the business to be transacted within the foreign State and as to the financial condition

[1] Daly *v.* Company, 64 Ind. 1.
[2] See Part III. Table 13, page 583.
[3] St. Clair *v.* Cox, 106 U. S. 356; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404.
[4] Evans *v.* Lee, 11 Nev. 194; D. F. Co. *v.* Augustine, 5 Wash. 67; 31 Pac. 327; Huffman *v.* Company, 13 Tex. Civ. Ap. 169; 36 S. W. 306.

of the corporation.[1] The right to transact business in a foreign State is a matter of State comity, pure and simple. The recognition of a foreign corporation and enforcement of its contracts in States other than that of its creation rests only on comity, and any conditions governing the right to transact business outside of the domiciliary State of the corporation may be imposed upon them or they may be entirely excluded.[2] But the conditions imposed must not be repugnant to the Constitution of the United States or to the public policy of the foreign State as evidenced by its statutory enactments and judicial decisions, nor can they be repugnant to rules of public law.[3]

In this connection it may be observed that foreign corporations cannot claim the protection of the prohibition of the United States Constitution against denying to citizens of any State the privileges and immunities of citizens of the several States.[4] Nor can they claim the benefit of the clause against denying to any person equal protection of the law.[5]

A State may preclude all foreign corporations not engaged in interstate commerce or in the employ of the general government from transacting business within its limits, and the courts cannot inquire into its reasons for so doing.[6] A State may discriminate between foreign and domestic corporations.[7] In short, the power of States over foreign corporations with respect to imposing conditions for doing business are as broad as those exercised over domestic corporations.[8] Wherever a corporation transacts its business it carries its charter with it, and that becomes the law of its existence in the foreign State, for the charter is the same abroad as it is at home. Whatever disabilities are placed upon the corporation at home are ordinarily equally binding upon it abroad, and whatever proper legislative control it is subject to must in general be recognized and submitted to by those who deal with it elsewhere.[9] The foregoing rule should be qualified

[1] Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray, Mass. 376.
[2] Paul *v.* Virginia, 8 Wall. (U. S.) 161.
[3] Lafayette Ins. Co. *v.* French, 18 How. 407; S. P. Ry. Co. *v.* Denton, 146 U. S. 201; Am., etc. Christian Union *v.* Yount, 101 U. S. 356.
[4] Paul *v.* Virginia, 8 Wall. (U. S.) 168.
[5] P. C. S. M. & C. Co. *v.* Pennsylvania, 125 U. S. 181.
[6] Doyle *v.* Company, 94 U. S. 541; Horn Silver Mining Co. *v.* New York, 143 U. S. 314.
[7] Ducat *v.* Chicago, 10 Wall. (U. S.) 415.
[8] Orient Ins. Co. *v.* Daggs, 173 U. S. 566.
[9] Canada, etc. Ry. *v.* Gebherd, 109 U. S. 597; Isle Royale Land Corporation *v.* Sec. of State, 76 Mich. 162; 43 N. W. 14.

by the statement that a foreign corporation can do no act in a foreign State which cannot be done through the intervention of a mere agent and which is not in contemplation of law the direct act of the corporation itself.[1]

Comity between States authorizes a corporation to exercise its charter powers within any State, but it does not permit the exercise of a power where the policy of that State distinctly marked by legislative enactments or constitutional provisions forbids it.[2] It has been well said that "no rule of comity will allow one State to charter corporations to operate in another State unless there is willingness on the part of the foreign State that it should be so. To hold otherwise would be to say that the right of one State by comity is superior to the sovereign will of the other. This involves the surrender of sovereignty to a rule of comity and to a matter of international etiquette, which no sovereign State should for a moment think of."[3]

A great deal of litigation has arisen through the question whether or not foreign corporations may exercise the same powers in a foreign State that their charter authorizes them to exercise in the domestic State. It has been held that foreign corporations cannot exercise outside of the domicile State powers which their own charters do not permit them to exercise within the State of their origin, nor can they exercise powers in a foreign State not permitted to corporations organized under the laws thereof.[4] They cannot, however, do any acts which are contrary to the public policy of the foreign State.[5] Nor can they transact business for which domestic corporations cannot be formed on account of statutory prohibition thereof.[6]

In some jurisdictions what are termed "retaliatory statutes" have been enacted. The purpose of these statutes is to put corporations coming from other States upon the same plane as domestic corporations of that State are placed when they seek in turn to transact business in the States referred to.[7] Sometimes the laws of the foreign State expressly provide that foreign

[1] Duke *v.* Taylor, 37 Fla. 641; Demarest *v.* Flack, 128 N. Y. 205; 28 N. E. 645; Colwell *v.* Company, 100 U. S. 55.

[2] McDonough *v.* Murdoch, 15 How. (U. S.) 413.

[3] Empire Mills *v.* Company (Tex. Ap.), 15 S. W. 506.

[4] Diamond Match Co. *v.* Powers, 51 Mich. 145; Clarke *v.* R. R. Co., 50 Fed. 338; State *v.* Water Co., 61 Kan. 563; People *v.* Howard, 50 Mich. 239.

[5] L. G. R. T. Co. *v.* Commissioners, 6 Kan. 245.

[6] Empire Mills *v.* Company (Tex. Ap.), 15 S. W. 200.

[7] Talbot *v.* Company, 74 Mo. 544.

corporations shall have no rights or privileges other than those possessed by domestic corporations of the same character. A fair interpretation of such statutes would seem to be that such foreign corporations shall have equal powers with domestic corporations of a character similar to their own.[1]

In a recent case an interesting question arose as to the legal effect of inserting powers in a charter to be exercised only outside of the State, such powers being forbidden by the laws of the State in which the corporation was organized.[2] In this case the Federal Court of the State of Washington spoke as follows:

"It has become a habit of business men in this country to organize corporations in one State to operate in another, and presumably there is some advantage to be gained thereby, otherwise the practice would not be continued. But no sound reason has been advanced, and none occurs to my mind, for giving additional encouragement to the practice by judicially expanding the powers of such corporations so as to include additional rights and powers to be exercised abroad but not at home. Corporations organized under legislative statutes are not endowed with the rights of natural persons to do as they please except when restrained by prohibitive laws. On the contrary, the rule is that they have only such powers and rights as the statutes confer, and the enumeration of their powers implies the exclusion of all others except such subordinate and incidental rights and powers as are essential to their existence and the exercise of the rights and powers conferred in express terms, and the corporation can make no contracts and do no acts other than permitted by the State which created it except such as are authorized by its charter."

The general rule is that foreign courts will not interfere in the internal management of foreign corporations; that is, except in the presence of extraordinary circumstances.[3] In this connection a distinction obtains where the act complained of affects the party solely in his capacity as stockholder, for there he must seek redress of his grievance in the courts of the domiciliary State of the corporation. But where the act affects his individual

[1] See sec. 15, Art. XII. California Constitution; sec. 11, Art. XV. Montana Constitutions; I. & M. B. Co. *v.* Stone, 174 Mo. 1; 73 S. W. 453; MacGinniss *v.* Company (Mont.), 75 Pac. 89; Lowe *v.* Company, 52 Cal. 60.

[2] Seattle Gas & Electric Co. *v.* Citizens' Light & Power Co., 123 Fed. 588; 125 Fed. 1001.

[3] Sidway *v.* Company, 104 Fed. 481; Kimball *v.* Company, 157 Mass. 7; 31 N. E. 697.

rights he may seek redress in any tribunal where jurisdiction may properly be acquired.[1] Foreign courts have not the power to forfeit charters of foreign corporations.[2]

Quo warranto is the proper proceeding to try the right of a foreign corporation to carry on corporate business in a foreign State.[3]

The certificate of the Secretary of State authorizing a foreign corporation to transact business within the State is a franchise emanating from the State, and cannot be gone behind or revoked by any authority but the State.[4]

§ 128. **Doctrine of State Comity.** — What is known as the "doctrine of State comity" is nothing more nor less than a recognition of the principle that the right of foreign corporations to engage in business in a State other than that of their creation depends solely on the will of such other State.[5]

While there are exceptions to this rule they only exist where the corporation created by one State rests its right to enter another and engage in business therein upon the nature of its business. As, for instance, where it is necessarily an instrumentality of interstate commerce, and its business constitutes such commerce, it is therefore wholly within the paramount authority of Congress. In this case the exceptional business is protected against interference by such authority.

If the power to regulate applies to all the instances to which such commerce gives rise, and to all contracts which might be made in the course of its transactions, that power would embrace the entire sphere of mercantile activity in any way connected with the trade between the States, and would exclude State control over many contracts purely domestic in their nature. The power to exclude where it exists, embraces the power as well to regulate and to enforce all legislation in regard to things done within the State which may be directly or incidentally requisite in order to render the enforcement of the State powers efficacious to the fullest extent, subject always of course to the paramount authority of the United States.[6] Let us now turn our attention

[1] N. S. C., etc. Co. *v.* Field, 64 Fed. 151; M. B. T. Co. *v.* R. G. N. Co., 81 N. Y. Sup. 302.

[2] Fritts *v.* Palmer, 132 U. S. 289.

[3] State *v.* Ins. Co., 39 Minn. 538; 41 N. W. 108.

[4] State *ex rel. v.* Ackerman, 51 O. St. 163; 37 N. E. 828.

[5] Hooper *v.* State of California, 155 U. S. 148.

[6] W. U. Tel. Co. *v.* Mayer, 28 O. St. 521.

to the attitude maintained by the State courts towards foreign corporations.

One of the familiar features of the present day is the organization of corporations under the laws of one State whose statutes are particularly favorable with the intention of carrying on no business in the State of its organization and with the avowed purpose of carrying on business in other States. Long ago these corporations were nominated as "tramp corporations," and there was at the outset some effort made on the part of the courts to limit the powers and question the legal status of such corporations. There was an attempt made to induce the courts to refuse to judicially recognize such corporations, and to hold their stockholders liable upon their contracts as partners and upon their torts as joint tortfeasors.[1]

But the liberal policy of the American States in extending hospitality to foreign corporations and the powerful influence of interstate comity has completely overcome the tendency here referred to, so that at the present day the doctrine is established in practically every State in the Union, that each of these States will recognize as valid a corporation formed under the laws of another State for the express purpose of doing business outside of the State of its origin.[2]

The broader view taken by the courts on this question is well set forth by the decision of the New York Court of Appeals in Merrick *v.* Van Sanvoort.[3] In this case attempt was made to establish the doctrine that where a Connecticut corporation conducts all its business in the State of New York, it must thereby be deemed to have migrated to New York and to have forfeited its charter, thus permitting creditors of the corporation to hold the members, officers, and agents of the corporation personally liable for the debts and torts of the corporation. In refusing to recognize this doctrine the court spoke as follows:

"Hitherto corporate enterprise has not been trammelled by unfriendly legislation. No jealousy or competition or rivalry of adverse interest has been permitted to convert State lines into barriers

[1] See Hill *v.* Beach, 12 N. J. Eq. 31; Landgrant, etc. Co. *v.* Coffey Co., 6 Kan. 245; Montgomery *v.* Forbes, 148 Mass. 249; 19 N. E. 342; Atterberry *v.* Knox, 4 B. Monroe (Ky.), 90.

[2] See Merrick *v.* Van Sanvoort, 34 N. Y. 208; Demarest *v.* Flack, 128 N. Y. 205; State *ex rel. v.* Cook (Mo.), 80 S. W. 929.

[3] 34 N. Y. 208.

of obstruction to the free course of general commerce. Its avenues have been open to all.

"In this country our individual interests are so interwoven that the union of the States is due, in its continuance, if not in its origin, as much to commercial as to political necessity. The citizens of each claim a birthright in the advantages and resources of all. They demand from their local authorities such facilities as the law-making power can afford in the employment of labor and capital. They claim such corporate franchises and immunities as may enable them to compete on equal terms with the citizens of other States. For these, with the structure of our institutions, they naturally look to their own government. They acknowledge a double allegiance in their local and federal relations, which, by general consent, carries with it a correlative community of rights. They may live in an inland State, but they are none the less citizens of a maritime nation, and they may lawfully organize companies at home for traffic on ocean highways.

"A corporate charter is in the nature of a commission from the State to its citizens, and their successors in interest, whether at home or abroad. Each government, in the exercise of its own discretion, determines the conditions of its grant. It is free to impose or omit territorial restrictions, but it can confer general powers to be exercised within its bounds or without them, wherever the comity of nations is respected. For the purpose of commerce such a commission is regarded like a government flag, as a symbol of allegiance and authority; and it is entitled to recognition abroad until it forfeits a recognition at home. . . .

". . . We think the policy of this State is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights and exclude others from the enjoyment here of privileges which have always been accorded abroad. Our national commerce is but the aggregate of that of the States, and every needless restriction by the operation of local laws is unjust and calamitous to all. We suppose the rules of comity on which we have hitherto acted to be generally accepted and approved. We see no reason why a Southern State may not grant to a corporation of its planters the right to erect mills for the manufacture of their cotton in New England; nor why the legislature of Massachusetts may not authorize a company of Lowell millers to raise cotton in South America or the Sea Islands. The State of Illinois touches neither the Atlantic nor the Pacific; but if it should organize a company of its citizens on the ocean with its office in the City of New York

and its business conducted by managers elected annually in Chicago, the rights of the corporation would be recognized wherever the obligations of national law are respected."

Through the operation of interstate comity corporations organized under the laws of one State may exercise their corporate powers outside of the geographical limits of the State from which they have obtained their charter. The doctrine of the courts on this subject is well set forth by the United States Supreme Court in Cowell *v.* Colorado Springs Co.[1] as follows:

"By the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporations in its limits or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations or allows corporations to be formed only by general law."

A most instructive case in this immediate connection is that of Demarest *v.* Flack,[2] wherein the New York Court of Appeals observed that:

"The courts of every State and country recognize foreign corporations through what is termed national or State comity. But whether such recognition shall be given must be decided by the courts of the country where the corporation seeks to do business. In our State, as in others, it is a question of domestic policy, and what that policy is must be determined by an examination of our own legislation. If we find any direct enactment upon the subject, it is our duty to obey it, and in its absence we must determine the question with reference to our general legislation and to the circumstances which surround us as a great and growing commercial community, having need of and employing large amounts of combined capital, and for whose prosperity and growth it is of the utmost importance that such capital should have the greatest facilities extended it for useful employment, with reasonable and proper personal exemptions from liability. We can find no reason for a domestic policy that should exclude from recog-

[1] 100 U. S. 55.

[2] 128 N. Y. 205; 28 N. E. 645.

nition by our courts foreign corporations generally. It may safely be said there can be no such domestic policy at the present day in a civilized State. . . .

"An examination of our laws shows that it is, and for many years has been, the policy of this State to enlarge the facilities for the formation of corporations. General laws are on our statute book for the formation of corporations of almost every conceivable kind, and under some one of them a corporation of the kind mentioned in the case could readily be formed. The freedom from personal liability would be as great and could be as easily attained under our own as under the laws of West Virginia. The security of the creditor would not be substantially greater in the case of the domestic than in that of the foreign corporation. In the latter the creditor has the remedy by attachment, and he can obtain about as easy access to its property as if it were domestic instead of foreign.

"There is really nothing to evade by incorporating under a foreign law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations, and where our laws provide for incorporating individuals for the purpose of doing that business, it is difficult to see how the terms 'evasion' and 'fraud' can be properly applied to acts of our citizens whereby they obtain incorporation in another State. When they come in our State to do business they must conform to our laws relating to foreign corporations and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws, and if there be any kind where none is imposed it is conclusive evidence that up to this time the legislature has not thought it conducive to the true interests of the State and its citizens to impose them. I do not intimate that it is necessary for a State to expressly by statute exclude foreign corporations from acting within its jurisdiction. The policy of the State may exclude them, and that policy may be clearly established by a reference to the general legislation of a State. I find none such in the laws of this State.

"It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we should not recognize as a corporation those of our own citizens who have gone to another State for the purpose of incorporating themselves under the laws thereof, to do business in our own State as such corporation.

"We think there is very little force in the argument. The public policy which we see in our own State, as evidenced by her laws upon

the subject of the formation of corporations, is one which looks to their ready and easy formation as a means of transacting business with an accumulation of capital and an exemption from personal liability to the largest extent consistent with reasonable supervision by the State. The facilities for incorporation offered by this State are not the result of any desire to promote the formation of corporations here as against their formation in other States. They are offered because of a policy on our part which urges upon the State the propriety of furnishing them as one means of controlling the business done by them and keeping it within our borders. If in any particular case it is thought by those interested in the matter that the business can be done in our own State and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form. The supervision of a foreign corporation by this State may easily be exercised by imposing terms as a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the legislature to say whether any, and if so what, terms shall be imposed upon such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the legislature, and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this State and do business here. The courts cannot themselves impose terms or conditions. . . .

"The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our State and composed of citizens of the foreign State, is equally potent when the foreign corporation is composed of our own citizens. It has always been supposed that a State should at least deal as liberally with its own citizens as with those of foreign States. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized with power to do business here and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and

equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?"[1]

§ 129. **What constitutes doing Business on the Part of a Foreign Corporation within the State.** — There is perhaps no subject of corporation law wherein will be found greater diversity in the opinions of the courts of the several Commonwealths than that relating to the rights of foreign corporations. The growth of corporate organization as well as the vast extension of the business of corporations outside of the State of their origin has made the question of determining what in legal effect constitutes doing business on the part of a foreign corporation in States other than that of its domicile one of great practical importance. As has already been observed, parties may incorporate in one State at the present time for the purpose of transacting their business in another Commonwealth.[2]

In some of the States, notably South Carolina, the legislatures have attempted to give a statutory definition as to what constitutes doing business on the part of a foreign corporation within the Commonwealth. In most of the States, however, the question is left for judicial determination. A fair example of such statutes is to be found in the New York statute[3] which provides that "no foreign corporation, other than a moneyed corporation, shall do business in the State without having first procured" a proper certificate from the Secretary of State that it has complied with the statutes in such case made and provided. From the foregoing it will appear that the whole question centres upon the meaning of the word "business" as used in the statutes, of which the foregoing is a fair example. It will be impossible within the limits of this work to discuss at any length the conflicting decisions of the courts on the point here referred to. All that it is proposed to do is to present certain rules which a careful reading of the authorities have shown to represent the prevailing and better considered opinions of the various courts on the questions presented. These rules may be enumerated as follows:

[1] See also Lancaster *v.* Amsterdam Improvement Co., 140 N. Y. 576; 35 N. E. 964.

[2] State *ex rel.* *v.* Cook (Mo.), 80 S. W. 929; Oakhill Mfg. Co. *v.* Garst, 18 R. I. 484; 28 Atl. 973; Hanna *v.* Company, 23 O. St. 622.

[3] New York Session Laws of 1890, chap. 563, sec. 150; amended by Laws of 1901, chaps. 96, 538.

(1) In order to constitute the transaction of business by a foreign corporation within the foreign State, it is not indispensable that it should do the greater part of its business therein. If it does any part of its ordinary business therein and the same cannot properly be styled purely interstate commerce, the same constitutes the transaction of business therein within the meaning of the statute.[1]

(2) Generally speaking, the making of a single contract within the foreign State does not constitute the transaction of business therein.[2] There must be more or less continuity in the matter.

(3) The institution and prosecution of actions not arising out of previous transactions had within the foreign State does not constitute the transaction of business within the meaning of the statute.[3]

(4) Sales of merchandise by foreign trading corporations made by means of non-resident travelling salesmen, or by correspondence had between the foreign corporation at the domiciliary office and customers in the foreign State, or upon unsolicited orders from customers in the foreign State, do not constitute transaction of business within the meaning of the statute regulating the transaction of business by foreign corporations.[4]

Aside from the question of the nature of the act, there are constitutional grounds upon which it would be held that corporations were not, under the circumstances here referred to, subject to the statutes in such foreign State compelling foreign corporations to obtain a permit to do business therein. The constitu-

[1] Lamb *v.* Lamb, 6 Biss. 420; Fed. Cas. No. 8018.

[2] Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; Gilchrist *v.* Helena H. S. & S. R. Co., 47 Fed. 593; Colorado Iron Works Co. *v.* Company, 15 Col. 499; 25 Pac. 325; Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119; Florsheim Co. *v.* Lester, 60 Ark. 120; 29 S. W. 34; Miller *v.* Williams (Col.), 59 Pac. 740; Tabor *v.* Company, 11 Col. 419; 18 Pac. 537; Creteau *v.* Foote Co., 40 Ap. Div. (N. Y.) 215; Sec. Co. *v.* Panhandle Nat. Bank, 93 Texas, 575; 57 S. W. 22; Missouri Coal Mining Co. *v.* Ladd, 160 Mo. 435; 61 S. W. 191; Payson *v.* Withers, 5 Biss. 269; Fed. Cas. No. 10864; Hope Mut. Life Ins. Co. *v.* Perkins, 38 N. Y. 404; Hart *v.* Livermore Co., 72 Miss. 809; 17 So. 769; Kilgore *v.* Smith, 122 Pa. St. 48; 15 Atl. 698; United States *v.* Company, 29 Fed. 17.

[3] Mandel *v.* Company, 154 Ill. 177; 40 N. E. 462; Smith *v.* Little, 67 Ind. 549.

[4] T. L. Co. *v.* Holbert, 5 N. Y. Ap. Div. 559; Novelty Mfg. Co. *v.* Connell, 88 Hun, 254; M. I. W. C. & S. Co. *v.* Mosher, 114 Mich. 64; 72 N. W. 117; F. & J. M. Co. *v.* Foster, 4 Dak. 329; J. S. L. Co. *v.* Chappell, 184 Ill. 539; 56 N. E. 539; Gale Mfg. Co. *v.* Finkelstein, 22 Tex. Civ. Ap. 241; 54 S. W. 619; Toledo Commercial Co. *v.* Company, 55 O. St. 217; Wolff Dryer Co. *v.* Bigler, 192 Pa. St. 466; 43 Atl. 1092; Droege *v.* Company, 163 N. Y. 466; 57 N. E. 747.

tional grounds here referred to have reference to those trading or quasi-public corporations engaged wholly in interstate trade and commerce and therefore not subject to regulation by State enactments.[1] The same rule applies where the corporation is in the employ of the general government.[2]

(5) Foreign corporations may take mortgages by way of investment or as security, or may take real estate as security or otherwise without coming within the prohibition of the statute, provided such acts are not within the express purposes for which such corporations were created, as for example where they are engaged in the mortgage loan or real estate business.[3]

(6) Foreign corporations may take property by devise in foreign jurisdictions, if their charter authorizes it, either expressly or by implication, without coming within the purview of the statute.[4]

(7) The mere fact that a corporation pays rent for offices for its agent employed to solicit orders in the foreign State does not in itself prove that the corporation is transacting business within the foreign State.[5] The question in all such cases is whether it is actually transacting business within the foreign State, and not whether some incident preliminary to the transaction of such business is to be performed there.[6] The maintenance of an office within the State may be considered as a circumstance done in connection with others to show that a foreign corporation is transacting business in the State, but it is by no means conclusive of the question.[7]

(8) Where a foreign corporation consigns goods to persons in a foreign State to sell, and sales are made there by the factor in his own name and the proceeds collected by him, this does not

[1] Robbins *v.* Shelby County Tax District, 120 U. S. 489; Brennan *v.* Titusville, 153 U. S. 289.

[2] Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

[3] C. U. A. Co. *v.* Scammon, 102 Ill. 46; Bard *v.* Poole, 12 N. Y. 495; A. M. L. I. Co. *v.* Owen, 15 Gray (Mass.), 491; Black *v.* Colwell, 83 Fed. 880; C. O. L. I. Co. *v.* Sawyer, 44 Wis. 387; Fritts *v.* Palmer, 132 U. S. 288; Bank *v.* Sherman, 28 Ore. 577; 43 Pac. 658; Simplex Dairy Co. *v.* Cole, 86 Fed. 739; Gilchrist *v.* Company, 47 Fed. 593; C. P. E. Co. *v.* Company, 152 Mass. 432; 28 N. E. 300; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; 28 L. E. 1137; F. B. D. G. Co. *v.* Lester, 60 Ark. 120; 29 S. W. 34.

[4] Am., etc. Christian Union *v.* Yount, 101 U. S. 352; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375; 6 N. E. 183; Lewisburg Baptist University *v.* Tucker, 31 W. Va. 621; 8 S. E. 410; Chamberlain *v.* Chamberlain, 43 N. Y. 444.

[5] People *ex rel.* Brewing Co. *v.* Roberts, 22 N. Y. Ap. Div. 284.

[6] Tallapoosa Lumber Co. *v.* Holbert, 5 N. Y. Ap. Div. 516.

[7] People *v.* Company, 175 N. Y. 76; American Broom & Brush Co. *v.* Addicks, 19 N. Y. Misc. Rep. 36.

constitute doing business within the foreign State within the meaning of the statute.[1]

(9) The renting of an office in a foreign jurisdiction in charge of a selling agent who distributes therefrom samples to customers and to travelling agents whose salaries are paid therefrom, together with the keeping of a bank account in such jurisdiction, does not necessarily constitute doing business within the foreign State within the meaning of the statute.[2]

Finally, in addition to the foregoing rules, it may not be without value in this connection to call particular attention to a few cases which seem to throw considerable light upon the general subject of what constitutes the transaction of business within a foreign State within the meaning of the Statutes already referred to. Attention is first called to the case of People *ex rel.* Kellogg Paper Co. *v.* Roberts.[3] Here an Illinois corporation furnished printed matter to local publishers in the State of New York. It kept solicitors in the State of New York to secure advertising patronage for a newspaper published by it in Chicago. For this purpose it had an office in the State of New York with a manager and five clerks. It also kept a New York bank deposit from which rent and salaries were paid amounting to an annual expense of $13,000. It had office furniture in the State of New York valued at $700. It was held that the corporation had no capital employed in the State of New York which rendered its capital stock liable to assessment for taxation. The court in its opinion stated:

"Office conveniences are permitted here to a foreign corporation doing business in another State to solicit orders to be executed in the other States without liability to our franchise tax. In People *ex rel.* Smith Co. *v.* Roberts,[4] the court held that office leases, bank accounts, and the keeping of samples within the State by foreign corporations were nominally incidental to the business of soliciting orders and making sales which the relator could carry on in the foreign State without being liable to taxation. It also observed that the machinery with which an interstate business is carried on is to some extent erected within the State and does not make such business taxable there."

[1] Bertha Zinc & Mining Co. *v.* Clure, 7 N. Y. Misc. Rep. 128.

[2] Washington Mills Co. *v.* Roberts, 8 N. Y. Ap. Div. 201; affirmed in 151 N. Y. 619; People *ex rel. v.* Roberts, 25 N. Y. Ap. Div. 13; People *ex rel. v.* Roberts, 29 N. Y. Ap. Div. 585.

[3] 30 N. Y. Ap. Div. 150.

[4] 27 N. Y. Ap. Div. 455.

In Vaughan Machine Co. *v.* Lighthouse,[1] the testimony showed that a foreign corporation had sold merchandise in New York both by agents and by correspondence, and in this case it had no office within the State. Upon the question whether this constituted the transaction of business within the State, the court spoke as follows:

"The statute does not intend to relate to business conducted in the manner just referred to. It contemplates a location, a domicile, having an office and the investment of some part of its capital within the State. Orders can then be transmitted and dealings had with it at this office and the conduct of its business is thus transferred, in a measure at least, to the headquarters established within the territorial limits of this State. It thus settles within the State, and enjoys the benefits incident to a domestic corporation, and the legislature imposes requirements and obligations upon it by reason of the privilege conferred of doing business like a body corporate organized in this State. It was never intended to hamper trade and restrict interstate commerce by bringing within its ban every corporation which happens to cross the State boundary with its wares to supply customers who have ordered them from the home office.

". . . It must be kept in mind that it was not designed to fetter or exclude business from the State. Its aim was to require a foreign corporation, which was on a level in its privileges with one organized here, to bear the burdens and be equally accessible to process with State corporations. To give it the construction contended for by the defendant would interfere with that comity between the States in their trade relations which has been potential in the development of our commercial and industrial business."

In Cummer Lumber Company *v.* Insurance Company,[2] the court spoke as follows:

"This statute — relative to foreign corporations obtaining a permit to do business in this State — was simply declaratory of the policy of the State that foreign stock corporations should not carry on any business in this State which similar corporations organized under its laws could not lawfully conduct. Its purpose was not to avoid contracts, but to provide an effective supervision and control of the business proposed to be carried on here by foreign corporations, and it is absurd to contend that it had no reference to the facts established by the evidence in the case at bar."

[1] 64 N. Y. Ap. Div. 138.

[2] 67 N. Y. Ap. Div. 151.

Again, the court said:

"The scope of the law here under consideration is that of merely undertaking to regulate the business of foreign corporations so that they shall not do business under more advantageous terms than those allowed to corporations of this State. It has no relation whatever to the incidental contracts of a foreign corporation made with a domestic corporation, such as the insurance of the property of a lumber company organized under the laws of Florida and doing business in that State."

Finally, attention is called to People *ex rel.* Dives Pelican Company *v.* Feitner.[1] In this case a corporation organized under the laws of the State of Colorado had its principal place of business in the State of New York and had an office in the City of New York. The New York office was maintained for the sole purpose of enabling the directors of the corporation to meet in it and declare dividends on its stock. No goods of the corporation were sent to or sold in New York. It had no bills receivable in New York, and the only assets which it had in that State were office furniture and money on hand and in bank which had been sent from its principal office to its New York office for the purpose of paying dividends. It was held that the corporation was not doing business in the State of New York within the meaning of the statute.

§ 130. **Penalty for transacting Business in a Foreign State without obtaining a Permit.** — The statutes of the various States differ materially with respect to the penalty that attaches to the transaction of business by a foreign corporation without having first complied with the statute relative to obtaining a permit to transact the same. The form of penalty prescribed usually takes one of five forms, to wit:

(1) Suspending the right to maintain suits in the courts of the foreign State until the statute has been complied with. (2) Statutes absolutely prohibiting the right to bring suit on contracts entered into in the foreign State before the obtaining of a permit to do business therein. (3) Statutes providing that all contracts made by a foreign corporation before obtaining a permit to do business in a foreign State shall be absolutely void. (4) Statutes providing penalties in certain designated amount for failure to

[1] 77 N. Y. Ap. Div. 189.

obtain a permit in a foreign State before transacting business therein. (5) Statutes merely giving the right to the State to bring proceedings to oust or exclude foreign corporations from doing business within the foreign State without having first obtained a permit so to do. Each of the foregoing will now be taken up briefly for separate consideration.

(1) *Suspending the right to maintain suits in the courts of the foreign State until the statute has been complied with.* Such statutes do not affect the validity of contracts previously made in the foreign State by a foreign corporation, but merely prevent it from enforcing the same therein until it has obtained a permit to do business in such State.[1]

(2) *Statutes absolutely prohibiting the right to bring suit on contracts entered into in the foreign State before the obtaining of a permit to do business therein.* Such statutes exist in New York and read as follows:

"No foreign corporation now doing business in this State shall do business herein after December 31st, 1892, without having procured such certificate from the Secretary of State; but any contract previously made by the corporation may be permitted and enforced within the State subsequent to such date. No foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State unless prior to the making of such contract it shall have procured a certificate."

In interpreting this provision of the statutes the Supreme Court, in Dunbarton Flax Spinning Co. *v.* Greenwich and Johnsonville Railway Company,[2] spoke as follows:

"Unless prohibited by law, a foreign corporation, duly organized, can come into this State and exercise the legitimate powers conferred upon it and carry on any business not prohibited by our laws or against public policy. The State has the power, however, to compel compliance with its laws or to punish the corporation if it does not do so. And the legislature can deny to such corporation failing to comply with its laws by procuring a certificate and paying the license fee, all recourse to its courts to enforce its rights or to redress its wrongs. These statutes are, however, mere revenue regulations,

[1] Goddard *v.* Crefields Mills, 75 Fed. 818; 21 C. C. A. 530; Davis Provision Co. *v.* Fowler Bros., 163 N. Y. 580; 57 N. E. 1108.

[2] 87 Ap. Div.(N. Y.) 21.

compliance with which is made necessary in order to acquire the right to do business here and to enforce causes of action in our courts.

"In Lancaster *v.* A. I. Co.[1] it is said to be the policy of the State to encourage foreign corporations to enter its boundaries for the transaction of lawful business, and it is manifestly for the interest of the State that foreign capital should be actively employed within its borders."

(3) *Statutes providing that all contracts made by a foreign corporation before obtaining a permit to do business in a foreign State shall be absolutely void.* To have the effect stated above the statute must in express terms declare that contracts made by corporations which have not complied with the statute relative to obtaining a permit to do business within a foreign State, shall be absolutely void. Where such is the case, it is entirely clear that no action can be maintained by the corporation thereon in such foreign State.[2] Such statutes, however, have no extra-territorial effect.

In an Illinois case[3] the court spoke as follows:

"To permit the company, when they admit that they have disregarded all these requirements, to recover, would be for the courts to disregard the clearly expressed will of the general assembly, and to say what it has said shall be unlawful is and shall be lawful and binding. To enforce the payment of this note would be, virtually, to repeal a plain enactment of the legislature. When the legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the court shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate law, certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void, as to appellee, we entertain no doubt."[4]

[1] 140 N. Y. 576, 591; 35 N. E. 964.

[2] Bank of Louisville *v.* Young, 37 Mo. 398.

[3] C. M. H. A. Co. *v.* Rosenthal, 55 Ill. 85.

[4] See also McCanna & Fraser Co. *v.* Company, 74 Fed. 597.

(4) *Statutes providing penalties in certain designated amounts for failure to obtain a permit in a foreign State before transacting business therein.* In this connection two opposing lines of authority are to be met with, one holding that where a penalty is imposed, this is exclusive, but does not render the contract made by the foreign corporation, out of which the imposition of the penalty arose, invalid.[1] The other, and what appears to us the better, view is that although a specific penalty is provided, this in itself operates to render the contract, out of which the imposition of the penalty arose, illegal and unenforceable in the courts of such foreign State.[2]

(5) *Statutes merely giving the right to the State to bring proceedings to oust or exclude foreign corporations from doing business within the foreign State without having first obtained a permit so to do.* Unless some other remedy is prescribed by statute, the proper remedy, in case foreign corporations engage unlawfully in business in a foreign State, is for the State to bring *quo warranto* proceedings to oust or exclude such foreign corporation from doing business within the foreign jurisdiction.[3] In such proceedings the courts have the right to review, if they see fit, the action of the Secretary of State in issuing a permit to such foreign corporation to do business within the State.[4]

§ 131. **License Tax on Foreign Corporations.** — There is a clear distinction to be observed of course between the creation of a corporation under State authority and the licensing of a corporation already existing, to do business within the jurisdiction of such State.[5] Sometimes the statute provides that after foreign corporations have complied with certain formalities relative to obtaining a permit to do business within a foreign State, they shall thereby *ipso facto* become domestic corporations. Under such a statute it has been held that they thereby become for all purposes, except for such matters as pertain to federal affairs, domestic corporations and not mere licensed corporations.[6] It

[1] Clarke *v.* Middleton, 19 Mo. 54; Garrett Ford Co. *v.* Company, 20 R. I. 189; J. C. M. T. Co. *v.* Willhoit, 84 Fed. 514.

[2] Dudley *v.* Collier, 87 Ala. 431; 16 So. 304; C. M. H. A. Co. *v.* Rosenthal, 55 Ill. 85; State *v.* Briggs, 116 Ind. 55; 18 N. E. 395; Buxton *v.* Hamblen, 32 Me. 448; Stewart *v.* Company, 38 N. J. Law, 436.

[3] State *v.* Company, 47 O. St. 167; 24 N. E. 392; State *v.* Company, 91 Iowa, 517; 60 N. W. 121; State *v.* Company, 39 Minn. 538; 41 N. W. 108.

[4] State *v.* Company, 49 O. St. 440; 31 N. E. 658; State *v.* Company, 91 Iowa, 517; 60 N. W. 121.

[5] C. B. & Q. Ry. Co. *v.* Harris, 12 Wall. U. S. 65.

[6] Debnam *v.* Company, 126 N. C. 831; 36 S. E. 269.

has been repeatedly held by the United States Supreme Court that State legislatures may impose license taxes to any amount upon foreign corporations as a condition to the granting of the right of such foreign corporations to transact business in a foreign State.[1]

In addition to the payment of a tax, there are a number of other requirements in force in the various States differing one from the other, such, for example, as requiring the filing of a copy of the articles of incorporation, appointing an agent within the State to accept and receive service of process, etc. Such requirements if reasonable are valid.[2]

The State may, if it choose, tax without restriction as to amount or entirely prohibit a foreign corporation from doing business within the State, provided, however, it is not engaged in interstate commerce or is in the employ of the general government.[3] Some States, such for example as Ohio, New Jersey, and Nevada, adopt what are known as retaliatory statutes. The purpose of such statutes is to place foreign corporations which do business in foreign States under the same regulations as are imposed by the domiciliary State upon foreign corporations seeking to do business within such State.[4]

The power of a State to exclude foreign corporations from transacting business within its borders cannot be questioned, neither can its motives in so doing.[5]

Thirty-three of the States have imposed the payment of license taxes upon foreign corporations desiring to do business within the foreign State.[6]

§ 132. **Annual License Tax on Foreign Corporations.** — The right of a State to impose an annual license tax on foreign corporations transacting business within its borders is unequivocally established by the decision of the Supreme Court of the United States

[1] Paul *v.* Virginia, 8 Wall. 168; P. C. S. M. & N. Co. *v.* Pennsylvania, 125 U. S. 181; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 576; Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 184.

[2] Huffman *v.* Company, 13 Tex. Civ. Ap. 169; 36 S. W. 306; E. & S. A. M. & I. Co. *v.* Hardy, 93 Texas, 289; 55 S. W. 169; Utley *v.* Company, 4 Col. 369; Green *v.* Association, 105 Iowa, 628; 15 N. W. 935; Hamme- *v* Company, 130 U. S. 291.

[3] Horn Silver Mining Co. *v.* N. Y., 143 U. S. 305; Pierce *v.* People, 106 Ill. 11; State *v.* Phipps, 50 Kan. 609; 31 Pac. 1097.

[4] State *v.* Reinmund, 45 O. St. 214; 13 N. E. 30; Miles *v.* Woodward, 115 Cal. 308; 46 Pac. 1076; State *v.* Company, 39 Minn. 538; 41 N. W. 108.

[5] Doyle *v.* Company, 94 U. S. 535; Hartford Fire Ins. Co. *v.* Raymond, 70 Mich. 485; 38 N. W. 474.

[6] See Part III. Table 13, page 583.

in Horn Silver Mining Co. *v.* State of New York.[1] Upon the subject just referred to, that court spoke as follows:

"The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property, separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. The right of the States to thus tax it has been recognized by this court and the State courts in instances without number. It was said, in Delaware Railroad Tax,[2] that 'the State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion,' except, we may add, as that discretion is controlled by the Organic Law of the State. And, as we there said also, 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.'

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, as far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation — and all corporations in States other than the State of its creation are

[1] 143 U. S. 305.

[2] 85 U. S. (18 Wall.) 206.

deemed to be foreign corporations — it can claim a right to do business in another State to any extent, only subject to the conditions imposed by the laws.

"This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

"Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in Bank of Agusta *v.* Earle.[1] One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Teleg. Co. *v.* Western U. Teleg. Co.[2] The other limitation upon the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated we think by the late Mr. Justice Bradley in Stockton *v.* Baltimore & N. Y. R. Co.[3] As that learned justice said, 'If Congress should employ a corporation of ship-builders to construct a man of war, they should have the right to purchase the necessary timber and iron in any State in the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the State.'[4]

"Having the absolute power of excluding the foreign corporation, the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation or the corporation itself can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized."

[1] 13 Peters (U. S.), 519.

[2] 96 U. S. 1.

[3] 32 Fed. Rep. 9.

[4] Pembina Con. S. Min. & Mill. Co. *v.* Pennsylvania, 125 U. S. 181.

From the foregoing opinion it is clear that it is unquestionably within the power of the various State legislatures to impose an annual license tax upon foreign corporations transacting business within their limit. However, but few of the States have chosen thus far to exercise this power. Alabama, Colorado, Massachusetts. New York, Ohio, Oregon, Texas, Vermont, Virginia, Washington, and West Virginia are the only States which impose an annual license tax upon foreign corporations. In each of these States the tax is a graduated one, the amount thereof depending either upon the authorized capitalization of the corporation, or the amount of the capital stock represented by capital invested in the foreign State where such annual license tax is imposed.

§ 133. To what Extent is the Taxing Power of the State with Reference to Domestic and Foreign Corporations Engaged in Interstate Commerce Limited by the "Commerce Clause" of the Federal Constitution? — The question as to the extent of the legislative power of the various State legislatures with reference to taxing domestic and foreign corporations must always be arrived at by giving due consideration to the limitations imposed upon this power by the provisions of what is known as the "Interstate Commerce Clause of the Federal Constitution."[1]

Again, this question, in order to permit of intelligent consideration, must be viewed from four standpoints, to wit: (1) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States to impose organization taxes upon corporations engaged in interstate commerce? (2) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States to impose franchise taxes upon corporations engaged in interstate commerce? (3) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States to impose license taxes upon corporations engaged in interstate commerce? (4) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States to impose property taxes upon corporations engaged in interstate commerce? Each of these will now be taken up for separate consideration.

(1) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States

[1] See Constitution of the United States, Art. I. sec. 8, clause 3.

to impose organization taxes upon corporations engaged in interstate commerce? The State is said to possess inherent power to tax its corporations. So the State has undoubted power to exact a bonus for the granting of a franchise, payable in advance or *in futuro*.[1] A round sum or an annual charge, with or without reference to capital stock, may be asked by the legislature for such a franchise.[2] In discussing the question of the right of a State to impose a fee, a license or a tax upon corporations, the Supreme Court of the United States in Ashley *v.* Ryan,[3] spoke as follows:

"At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the tax for consolidation which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was as a necessary resultant also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the corporation cannot be permitted to hold on to the privilege or right granted and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. That the right to be a State corporation depends solely upon the grace of the State and is not a right inherent in the parties, is settled.

". . . It follows from these principles that a State in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained."

The right of the State to impose such taxes upon the organization of a corporation is in no wise affected by the Interstate Commerce Clause of the Federal Constitution; this, too, even when

[1] B. & O. R. R. Co. *v.* Maryland, 88 U. S. 456.

[2] Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 134.

[3] 153 U. S. 436

the corporation is formed for the express purpose of engaging in interstate commerce. In the words of the United States Supreme Court, "the right and privilege of being a corporation is of great value to its members, as it is considered as property separate and distinct from the property which the corporation may acquire. According to the law of most States this franchise, or privilege of being a corporation, is deemed personal property and is subject to separate taxation. The right of the State to thus tax it has been recognized by this court and the State courts in instances without number." [1]

(2) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States to impose franchise taxes upon corporations engaged in interstate commerce? Again, attention is here called to the decisions of the United States Supreme Court relative to the exercise of the power in question. "The granting of the rights and privileges," observes that tribunal, "which constitute the franchises of a corporation, being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant as well as also of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statutes of any State so far as it relates to its own corporations, nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation, it can claim a right to do business in another State to any extent only subject to the conditions imposed by its statutes. Only two exceptions or qualifications have been attached to the foregoing, to wit: One is that the State cannot exclude from its limits a corporation en-

[1] Horn Silver Mining Co. *v.* New York, 143 U. S. 305; Home Ins. Co. *v.* New York, 134 U. S. 594; Delaware R. R. Tax, 85 U. S. 206.

gaged in interstate or foreign commerce. The other limitation is that where the corporation is in the employ of the government. Having the absolute power to exclude the foreign corporation, the State may of course impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax or a sum proportioned to the amount of its capital. No individual member of the corporation or the corporation itself can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation." [1]

In a certain sense the imposition of an organization tax is as much the levying of a franchise tax as the imposition by a State of annual taxes upon corporations in return for the right to exercise their corporate powers within the jurisdiction of the State. The one has been defined to be a "franchise to be," and the other as a "franchise to do." [2]

(3) What effect, if any, has the Interstate Commerce Clause of the Federal Constitution upon the right of the several States to impose license taxes upon corporations engaged in interstate commerce? Strictly speaking, the imposition of a franchise tax has reference only to domestic corporations, while license taxes, when applied to corporations, have reference not only to domestic corporations, but to foreign corporations as well. Foreign corporations, as such, can be taxed by foreign States only upon corporate property situated within such foreign State, or upon the business done there. They cannot be taxed in a foreign State on account of their corporate franchises, as that was not given by the laws of the foreign State but was dependent upon the laws of the State of its creation and had an existence separate therefrom. A corporation may, through its agents, extend its operations into other States, and thus, metaphorically speaking, go there; but it never really travels, and its franchises exist only at the place of its domicile and residence. [3]

[1] Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

[2] Adams Express Co. *v.* Ohio, 166 U. S. 224; Home Insurance Co. *v.* New York, 134 U. S. 600; Reading R. R. *v.* Pennsylvania, 15 Wall. 296; State R. R. Tax Cases, 92 U. S. 603; California *v.* Company, 127 U. S. 1; Society for Savings *v.* Coite, 6 Wall. 606; Maine *v.* Ry. Co., 142 U. S. 227.

[3] People *v.* Equitable Trust Co., 96 N. Y. 387; Plimpton *v.* Bigelow, 93 N. Y. 592.

On the other hand, there is clear distinction between a license tax and a property tax. The former involves a charge for permission or authority to transact certain business, while the latter, when applied to corporations, is a contribution imposed upon and measured by the property of the corporation.[1]

The right to impose a license tax upon corporations is subject to the following limitation: If the tax is essentially a regulation of interstate commerce and its imposition does not constitute a proper exercise of the police power of the State, then it comes within the inhibition of the Interstate Commerce Clause of the Federal Constitution.[2]

Again, in Pembina Consolidated Silver Mining & Milling Co. *v.* Pennsylvania,[3] the United States Supreme Court spoke as follows:

"The exaction of a license fee to enable the corporation to have an office for the transaction of its business within a foreign State is clearly within the competency of the legislature of that State. The recognition of the foreign corporation's existence in a foreign State, even to the extent of allowing it to have an office within its limits for the use of its officers, agents, and employees, was a matter dependent upon the will of the State. It could make the grant of the privilege conditional upon payment of a license tax and fix the same according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right of a conditional and restricted exercise of its corporate powers within the State. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction

[1] Cooley on Taxation, 2nd ed. pp. 383, 576; Welton *v.* Missouri, 91 U. S. 275; Emert *v.* Missouri, 156 U. S. 296.

[2] People *ex rel.* Pennsylvania R. R. *v.* Wemple, 138 N. Y. 1.

[3] 125 U. S. 181.

by such corporations of interstate or foreign commerce. It is not every corporation lawful in the State of its creation that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may therefore require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment.

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by State authority."

In Waters Pierce Oil Co. *v.* Texas[1] it was said that:

"Having no absolute right of recognition in other States, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

In Hooper *v.* California,[2] conditions imposed upon a foreign corporation were considered, and a statute was sustained, making it a misdemeanor for a person in California to procure insurance for a resident in that State from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the State. All preceding cases were cited, and it was assumed as settled "that the right of a foreign corporation to engage in business within a State other than that of its creation,

[1] 177 U. S. 28.

[2] 155 U. S. 648; 39 L. Ed. 297.

depends solely upon the will of such other State." And the exception to the rule was stated to be "only cases where a corporation created by one State rests its right to enter another and to engage in business therein upon the federal nature of its business."

A State may tax the franchise of a domestic corporation or impose a license tax upon a foreign corporation, but can only subject a corporation engaged in interstate commerce or in the employ of the general government to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens.[1]

The power to license is a police power, although it may be exercised for the purpose of raising revenue.[2] But the State in the exercise of the police power cannot impede interstate commerce by discriminating taxes.[3]

The question next arises as to what constitutes a proper exercise of the police power on the part of a State. A State may lawfully in the exercise of this power provide for security of lives, limbs, health, and comfort of persons and protection of property, or in regulation of highways, canals, railways, and other commercial facilities, passage of laws to regulate sale of articles deemed injurious to health or morals of community; imposition of taxes on persons residing within the State and upon occupations pursued therein, not directly connected with foreign or interstate commerce or with some other business exercised under authority of the United States and imposition of taxes upon all property within the State mingled with and forming part of the great mass of property therein.[4]

(4) What effect, if any, has the interstate commerce clause of the Federal Constitution upon the right of the several States to impose property taxes upon corporations engaged in interstate commerce?

[1] Postal Telegraph Co. *v.* Adams, 155 U. S. 696.

[2] Wiggins Co. *v.* East St. Louis, 107 U. S. 374.

[3] Austin *v.* Tennessee, 179 U. S. 344; License Cases, 5 How. (U. S.) 592.

[4] Robbins *v.* Shelby Co. Tax District, 120 U. S. 493. See also Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 576; Philadelphia, etc. Ass'n *v.* New York, 119 U. S. 119; Horn Silver Mining Co. *v.* New York, 143 U. S. 305; Postal, etc. Cable Co. *v.* Charleston, 153 U. S. 693; Martin *v.* R. R. R., 151 U. S. 677; Hooper *v.* California, 155 U. S. 652; Bonman *v.* Railway, 125 U. S. 491; Smith *v.* Alabama, 124 U. S. 474.

A State may tax corporations for their privileges within the State in lieu of all other taxes, provided the amount is made dependent on the value of its property within the State and payment is not a condition precedent to the right to carry on its business. The tax then becomes a mere property tax and not an interference with interstate commerce.[1]

The existence of federal supervision over interstate commerce is not inconsistent with the power of the State to control its internal commerce and to tax franchises, property, or business of domestic corporations engaged in such commerce, nor with power to tax foreign corporations on property within the State.[2] In this connection it has been well said that

"commerce between the States consists of intercourse and traffic between their citizens and includes the transportation of persons and property, and the navigation of public waters for that purpose as well as the purchase, sale, and exchange of commodities. It makes no difference whether such commerce is carried on by individuals or by corporations. It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it is within the jurisdiction of the State. Where there is jurisdiction on the part of the State neither as to persons nor property, the imposition of a tax is unconstitutional and void. If the legislature of a State enacted that the citizens of another State or country should be taxed in the same manner as the persons within its own limits, and subject to its authority or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action. It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a corporation is a tax upon its property and assets; that it is undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State, but that such a tax is in no sense a license tax. It is a fundamental principle that in order to tax the corporation it must have a domicile within the State; that when it is sought to tax capital stock of a corporation, the law imposing such a tax must be construed to mean so much of the capital stock as is measured by the property actually brought within the State by the corporation in the transaction of its business. To the States must be conceded power

[1] Postal Tel. Co. *v.* Adams, 155 U. S. 696.

[2] Erie R. R. *v.* Pennsylvania, 158 U. S. 437.

to exclude foreign corporations altogether from its borders or to impose a license tax so heavy as to amount to the same thing. They must be denied the power to tax either persons or property not within their jurisdiction." [1]

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196. See also Philadelphia, etc. Steamship Co. *v.* Pennsylvania, 122 U. S. 345; Norfolk, etc. R. R. *v.* Pennsylvania, 136 U. S. 120; Ashley *v.* Ryan, 153 U. S. 446; Erie R. R. *v.* Pennsylvania 158 U. S. 437; New York State *v.* Roberts, 171 U. S. 665.

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